United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

76-1324

B
P/S

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

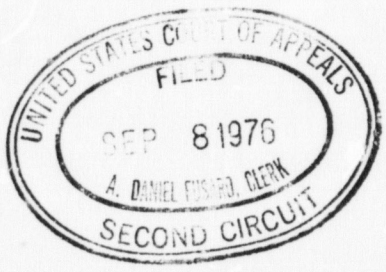
JACK G. SCHWARTZ and GEORGE SARKIS, a/k/a "GEORGE",

Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of New York.

APPENDIX FOR DEFENDANT-APPELLANT JACK G. SCHWARTZ

SAXE BACON & BOLAN, P.C.
Attorneys for Appellant
39 East 68th Street
New York, New York 10021
(212) 472-1400



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DOCKET ENTRIES

CRIMINAL DOCKET

Assigned Trial 0712 | Disp./Sentence | District 207 | Office 1

U.S. vs. JACK SCHWARTZ

75 CR 894 defendant

Case Filed: Day 24 Mo. 11 Yr. 75 | Docket No. 894 | No. of Defdts. 3

UNSEALED

MAGIS. CASE NO. 75M123

CHARGES: 18-894 & 2 — Did attempt to collect extensions of credit by extortionate means, etc. 3

AUG 4 1975

BAIL / RELEASE: Denied ☐ | Personal Re ☒ | Unsecured B ☐ | Conditional Rele ☐ | AMT Set (000) 25 | 10% D ☐ | Surety ☐ | Collate ☐ | 3rd Par Custod ☐ | PSA ☐ | 1x1 | Z cash date 23 | Bail Not Made ☐ | Bail Status Changed (See Docket) ☐

ATTORNEYS: Steven Kimelman

x Roy M. Cohn
39 E. 68th St., NYC.
472-1400

ARREST	INDICTMENT	ARRAIGNMENT	TRIAL	SENTENCE
7-16-75 or U.S. Custody Began on Above Charges	Information 11-24-75	12/1/75	Trial Set For 1	Disposition
High Risk Defn. & Date Design'd	Waived ☐	1st Plea 12/1/75	Voir Dire ☐	Convicted ☐ On All Ch
Prosecution Deferred ☐	Superseding ☐ Indict/Info ☐	Final Plea	Not Guilty ☐ Nolo ☐ Guilty ☐	Trial Began 5/13/76 ☐ N J
			Not Guilty ☐ Nolo ☐ Guilty ☐	Trial Ended 5/19/76
				Acquitted ☐ On Lesser Offense(s)
				Dismissed ☐ WOP ☐
				Nolled/Discontinued* ☐

		DATE	INITIAL/No.
Search Warrant	Issued		
	Return		
Summons	Issued		
	Served		
Arrest Warrant		7-16-75	VAC/o70A
COMPLAINT		"	"
OFFENSE (In Complaint)		Extortionate Credit Transaction	

INITIAL APPEARANCE — INITIAL/No.

PRELIMIN. EXAMINATION OR REMOVAL HEARING — Date Scheduled ____ Date Held ____ — ☒ Waived ☐ Not Waived — ☐ Intervening Indictment

Tape No. — INITIAL/No.

OUTCOME

☐ Dismissed
☐ Held for District GJ
BOND ☐ Exonerated ☐ To Transfere District
☒ Held to Answer to U. S. District Court
AT: ED NY

Magistrate's Initials ▶

* Show last names and suffix numbers of other defendants on same indictment/information

EBBERT 2; SARKIS 3

DATE	PROCEEDINGS	V. Excludable Delay (a)	(b)	(c)	(d)
11-24-75	Before Costantino J - Indictment filed - ordered sealed by the court.				
12-1-75	Before COSTANTINO J - On motion of AUSA Kimelman the Indictment is ordered opened by the Court.				
~~12-10-75~~	~~Before NEAHER, J - case called - defts not present - atty for defts present - case adjd on consent to Jan. 19 1976 for trial~~				
12-10-75	Notice of Appearance filed.				
12-10-75	Before MISHLER, CH J - case called - deft Schwartz present with atty Roy Cohn; deft arraigned and enters a plea of not guilty - bail conditions contd - time to make motions extended to Jan. 19, 1976. case set down to fix trial date on Jan. 9, 1976.				
12/30/75	Notice of readiness for trial filed				
1-9-76	Before MISHLER, CH J - case adjd to Jan. 23, 1976 for setting of a date for trial.				
1-16-76	Notice of Motion filed, ret. Jan. 23, 1976, for dismissing the indictment, Inspection [illegible]				

BEST COPY AVAILABLE

	Letter filed dated Jan. 29, 1975, received from Chambers extending bail limits and letter from defts atty M.Rosen, filed.	A.
,76	Before MISHLER,CH.J.- Case called- motion for inspection argued- decision reserved	
3-31-76	Govts response filed to omnibus motion of deft and Memorandum filed.	B.
12-76	Two letters filed received from Chambers extending bail limits of the deft to travel to Monte Carlo on 4-8-76 and to return on 4-15-76 etc.	C. D. E.
15-76	By MISHLER, CH J - Memorandum of decision and order filed on defts motions; motion to inspect Grand Jury Minutes is denied; motion to dismiss Item II (A) & Item II(B) denied; motion pursuant to Rule 16 Govt complied with the demand, etc. Motion pursuant to Rule 16 is granted as indicated onthe record; motion for severance is denied; motion to suppress illegally seized evidence is denied; defts motion to direct the Govt to turn over all materials etc. is granted; motion for Bill of Particulars is denied; motion for names of Govt witnesses is denied;etc.	F. G.
4-19-76	Amendments to Govts response to omnibus motion of deft filed.	H.
4-23-76	Before MISHLER, CH J - case called - Pre Trial motions argued and concluded - April 26, 1976 for trial.	
4-26-76	Before MISHLER, CH J -case called - deft & atty present - Identification hearing held & concluded - Audibility hearing held & concluded - trial contd to 4-28-76	I. M.
4-28-76	Before MISHLER, CH J - case called - deft & counsel present - trial resumed - trial contd to 4-29-76	N.
4/29/76	Before MISHLER,CH.J - Case called- deft and counsel present-trial resumed-trial contd to 4/30/76	O.
/30/76	Before MISHLER,CH.J.- Case called- deft and counsel present-trial resumed- trial contd to 5/3/76 at 10:00 A.M.	P. R.
5-3-76	Before MISHLER, CH J - case called - deft present with counsel Roy Cohn and Michael Rosen - trial resumed - trial contd to May 4, 1976 at 9:30 am	
5-4-76	Before MISHLER, CH J - case called - deft & counsel present - trial resumed - trial contd to May 5, 1976	T.
5-5-76	Before MISHLER, CH J -case called - deft & counsel present - trial resumed - Govt rests - motion by defts to dismiss the indictment is denied - trial contd to May 6, 1976	U.
6/76	Before MISHLER,CH.J.- Case called- deft and counsel present- trial resumed-motion for mistrial denied trial contd to 5/10/76 at 10:00 A.M.	V.
10-76	Before MISHLER, CH. J. - Case called. Deft & counsel present. Trial resumed. Trial continued to 5-11-76.	
/11/76	Before MISHLER,CH.J.- case called- deft and counsel present-trial resumed- trial contd to 5/12/76	W.
5-12-76	Before MISHLER, CH J - case called - deft & counsel present - trial resumed -deft rests - trial contd to May 13,1976	Y.
13-76	Before MISHLER, CH J - case called - deft & counsel present - trial resumed - both sides rest - deft renews motion made	

(a) Interval (per Section II)	(b) Start Date / End Date	(c) Ltr. Code	(d) Total Days

7-10-76 | Docket entries

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a) (b) (c) (d)
	after the Govts. case - motions denied - trial contd to May 17, 1976 at 9:30 am.	
5-17-76	Before MISHLER, CH J - case called - deft & counsel present - trial resumed - motion by deft for a mistrial is denied - trial contd to 5-18-76	
5-17-76	By MISHLER, CH J - Order of sustenance filed (lunch-15 persons)	
5/18/76	Before MISHLER,CH.J.- Case called- deft and counsel present- trial resumed-motion for mistrial denied order of sustenance signed- trial contd to 5/19/76	
5/18/76	By MISHLER,CH.J.- Order of sustenance filed	
5-19-76	Before MISHLER, CH J - case called - deft & counsel present - trial resumed - At 9:35 am the jury retired for deliberations - at 4:35 PM the jury returned and rendered a verdict of guilty on count 2 as to deft and not guilty on counts 1 and 3 - jury polled and jury discharged - trial concluded - all motions reserved to time of sentence - sentence adjd without date - bail conditions contd .	
5-19-76	By MISHLER. CH J - 2 orders of sustenance filed (One for lunch and one for coffee etc)	
5-21-76	13 volumbs of stenographers transcripts filed (April 26,28, 29 and 30th) May 3, 4, 5,6. 10,11,12 13, and 17)	
5-27-76	Stenographers transcript filed dated May 19, 1976.	
5-28-76	Copy of letterx from chambers dtd 5-28-76 with annexed copy of letter from Walter G. Waterman dtd 5-20-76 filed.	
6/10/76	Letter from Michael Rosen to extend bail limits filed	
6/10/76	copy of Letter from Judge Misher granting request as stated in above letter	
6-10-76	Letter filed dated June 10, 1976 received from Chambers to counsel for ddeft Schwartz granting application extending bail limits.	
6-15-76	Stenographers transcript filed dated May 20, 1976	
7-2-76	Before MISHLER, CH. J. - Case called & sentence adj'd to 7-16-76 on consent.	
7-8-76	Notice of motion and memorandum of law for a new trial, ret 7-16-76 at 10 A.M. filed.	
7-12-76	Stenographers transcript filed dated May 18, 1976	
7-16-76	Before MISHLER, CH J - motion for new trial argued and denied.	
7016-76	Before MISHLER, CH J - case called -Deft & counsel Roy Cohen present - deft sentenced to imprisonment on count 2 for 3 years pursuant to 18:3651 - to serve 3 months in a jail type institution and execution of remainder of sentence is suspended and the deft is placed on probation for 33 months - deft fined $10,000.00. Execution of sentence stayed pending appeal. Bail conditions contd with Bail limits extended as indicated on the record.	
7-16-76	Judgment and commitment and order of probation filed - certified copies to Marshal and probation.	
7-16-76	Notice of appeal filed ... mailed to the court	

ATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
7/22/76	Record of Appeal recieved from Court of Appeals to be filed on or before August 5, 1976 filed.				
8-2-76	Stenographers transcript filed dated July 16, 1976				
8-3-76	Stenographers transcript filed dated May 20, 1976				
8-3-76	Record on appeal certified and mailed to the court of appeals				

A TRUE COPY
ATTEST
DATED August 3 1976
LEWIS ORGEL
CLERK
BY
DEPUTY CLERK

JACK SCHWARTZ

DOCKET NO. 75 CR 894

5a

JUDGMENT AND PROBATION/COMMITMENT ORDER

(FILED JULY 16, 1976)

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH 7 DAY YEAR 1976

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[XX] WITH COUNSEL Roy Cohen, Esq.
(Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged
[X] GUILTY. in count 2

Defendant has been convicted as charged of the offense(s) of violating T-18, U.S.C.Secs 894 & 2 in that on or about and between April 21 and July 10, 1975, both dates being approximate and inclusive, the defendant, with others, knowingly wilfully & unlawfully used extortionate means as that term is defined in T-18, U.S.C. Sec.391(7) in collecting extensions of credit from another by expressly and implicitly threatening another with the use of violence and other criminal means which would cause harm to the person, reputation and property of others

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

3 years on count 2 pursuant to T-18, U.S.Code,Sec. 3651. Defendant to serve 3 months in a jail-type institution and the execution of the remaining sentence is suspended and defendant is placed on probation for a period of 33 months. Defendant also to pay a fine of $10,000.00. Execution of sentence stayed pending appeal.

SPECIAL CONDITIONS OF PROBATION

FILED IN CLERK'S OFFICE U.S. DISTRICT COURT E.D. N.Y.
JUL 16 1976
TIME A.M. P.M.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set forth on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by Law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer.

Signed by
[X] U.S. District Judge
[ ] U.S. Magistrate

Jacob Mishler

Date 7/16/76

INDICTMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA

-against-

JACK SCHWARTZ, GROVE EBBERT, and GEORGE SARKIS, also known as "George",

Defendants.
- - - - - - - - - - - - - - - - - - - -x

INDICTMENT

Cr. No._____
(T. 18, U.S.C., 894, and §2)

THE GRAND JURY CHARGES:

COUNT ONE

On or about and between April 18, 1975 and July 10, 1975, both dates being approximate and inclusive, within the Eastern District of New York, the defendants JACK SCHWARTZ, GROVE EBBERT, and GEORGE SARKIS, also known as "George", knowingly, wilfully and unlawfully used extortionate means, as that term is defined in Title 18, United States Code, Section 891(7), in collecting and attempting to collect extensions of credit from Jack Taylor by expressly and implicitly threatening Jack Taylor with the use of violence and other criminal means which would cause harm to the person, reputation and property of Jack Taylor and others. (Title 18, United States Code, Section 894 and Section 2).

COUNT TWO

On or about and between April 21, 1975 and July 10, 1975, both dates being approximate and inclusive, within the Eastern District of New York, the defendants JACK SCHWARTZ, GROVE EBBERT, and GEORGE SARKIS, also known as "George", knowingly, wilfully and unlawfully used extortionate means, as that term is defined in Title 18, United States Code, Section 891(7), in collecting and attempting to collect extensions of credit from Fred McGee by expressly and implicitly threatening Fred McGee with the use of violence and other criminal means which would cause harm to the person, reputation and property of Fred McGee and others and thereafter using violence and other criminal means which caused harm to the property of Fred McGee and others. (Title 18, United States Code, Sections 894 and 2).

COUNT THREE

On or about and between April 18, 1975 and July 10, 1975, both dates being approximate and inclusive, within the Eastern District of New York, the defendants JACK SCHWARTZ, GROVE EBBERT, and GEORGE SARKIS, also known as "George", did knowingly, wilfully and unlawfully combine, conspire, confederate and agree together with Seymour Roth, named as a co-conspirator but not as a defendant herein, to use extortionate means, as that term

is defined in Title 18, United States Code, Section 891(7), to collect and attempt to collect extentions of credit from Jack Taylor and Fred McGee and to punish Jack Taylor and Fred McGee for the non-repayment thereof. (Title 18, United States Code, Section 894).

A TRUE BILL

_____
FOREMAN

_____
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

9a

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Docket Number 75 CR 894

HON. JACOB MISHLER
(District Court Judge)

NOTICE OF APPEAL

Notice is hereby given that JACK G. SCHWARTZ _____ appeals to the United States Court of Appeals for the Second Circuit from the X Judgment ☐ order ☐ other (specify) _____ entered in this action on JULY 16, 1976
(Date)

SAXE, BACON & BOLAN
(Counsel for Appellant)

Date JULY 16, 1976

Address 39 E. 68th ST.
NEW YORK, N.Y. 10021

To: U.S. ATTORNEY,
EASTERN DISTRICT
OF NEW YORK

Phone Number 472-1400

ADD ADDITIONAL PAGE IF NECESSARY

(TO BE COMPLETED BY ATTORNEY) TRANSCRIPT INFORMATION – FORM B

▶ QUESTIONNAIRE	▶ TRANSCRIPT ORDER ▶ DESCRIPTION OF PROCEEDINGS FOR WHICH TRANSCRIPT IS REQUIRED (INCLUDE DATE).
☐ I am ordering a transcript ☐ I am not ordering a transcript Reason: ☐ Daily copy is available ☐ U.S. Attorney has placed order ☐ Other. Attach explanation	Prepare transcript of ☐ Pre-trial proceedings ☐ Trial ☐ Sentence ☐ Post-trial proceedings

The ATTORNEY certifies that he will make satisfactory arrangements with the court reporter for payment of the cost of the transcript. (FRAP 10(b)) ▶ Method of payment ☐ Funds ☐ CJA Form 21

ATTORNEY'S signature	DATE
Saxe, Bacon & Bolan	July 16, 1976

▶ COURT REPORTER ACKNOWLEDGEMENT

To be completed by Court Reporter and forwarded to Court of Appeals.

Date order received	Estimated completion date	Estimated number of pages.

Date _____ Signature _____
(Court Reporter)

COPY FOR DEFENDANT

MR. IANNUZZI: Copies, originals, it doesn't matter.

MR. COHN: Sure.

MR. KIMELMAN: Good.

(In open Court.)

THE COURT: Your next witness, Mr. Kimelman.

MR. KIMELMAN: The Government calls Fred McGhee.

THE CLERK: Stand there, please. Face me and raise your right hand.

F R E D M C G H E E , having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KIMELMAN:

Q Mr. McGhee, where do you live?

A 31 Ontario Street, Huntington, Long Island.

Q How long have you lived at that address?

A Approximately eight years.

Q ARe you married?

A Yes.

Q Whom are you married to?

A I was divorced now by my common-law wife Deloras Thompson.

Q How long have you been with Delores Thompson?
A Approximately five years.
Q What is your profession, Mr. McGhee?
A Owner-operator, truck driver.
Q When you say "owner-operator" could you explain what you mean?
A I own my own business. I drive for a living.
Q What do you drive?
A Tractors and trailers.
Q What is the nature of your business? What do you haul in these tractors and trailers?
A Different commodities; LTLs, bathroom fixtures. It's different commodities.
Q Mr. McGhee, could you keep your voice up nice and loud so that everyone can hear you?
A Yes.
Q Where do you truck to?
A Chicago, Florida, Boston, Connecticut, South Carolina.
Q How long have you had your own business, Mr. McGhee?
A About six years.
Q What names, business names have you gone under?
A DFG Enterprise and KOTL Trucking.

Q How old are you?

A Thirty-five.

Q Did there come a time, Mr. McGhee, when you met an individual by the name of Victor Mignoli?

A Yes.

Q Do you know that individual by any other names?

A William Cappiello.

Q Can you tell us, briefly, how you met Mr. Mignoli?

A I ran in contact with him through the trucking business. He had loads going to Florida.

Q Did you enter into any transactions with Mr. Mignoli?

A There was one time that I was at his place and he asked me was I interested in buying a tractor and trailer.

Q Did there come a time in March or April of 1974 when you did purchase a tractor or a trailer from Mignoli?

A April the 9th, 1974, '71 Peterbilt.

Q Is this a tractor or a trailer?

A That's a tractor.

Q Did you pay him for that 1971 Peterbilt?

A $6,500.

Q And --

A I'm sorry. $16,500.

Q $16,500?

A Yes.

Q Did there come a time when Mr. Mignoli took you down to Gaines Service Leasing Corporation in Brooklyn?

A Yes. Yes, it was. This was in -- I believe it was in June.

Q What was the purpose of going down to Gaines with Mr. Mignoli?

A Well, I had a '64 International and I needed $4,000 and he took me down and introduced me to Mr. Jack Schwartz and Joel Lichtenstein.

Q Now, when you said you have an International, is that a truck that you owned already?

A Yes, it was.

Q And you were introduced to Mr. Schwartz and Joel Lichtenstein; is that right?

A Yes.

Q When you say "Mr. Schwartz," do you see Mr. Schwartz in the Courtroom today?

MR. COHN: We'll stipulate, your Honor, that Mr. Schwartz is in the Courtroom.

THE COURT: All right. Identification conceded.

Q And did you at that time enter into a transaction with Mr. Schwartz?

A Yes, I did.

Q What was that transaction?

A He loaned me $4,000 on the tractor. He took over the tractor, leased the tractor back to me.

Q And you were to pay back the money?

A $248 a month.

Q For how long?

A Can't recall the specific time, you know, how long it was, the period of time.

Q Did you begin to make payments on that -- excuse me. Strike that.

Did you begin to repay the money that you owed on the International?

A Yes, I did.

Q How many payments did you make, do you recall?

A I think it was two or three payments.

Q Did there come a time when you went back to Gaines to get some additional money?

A Yes; July.

Q What was the transaction that you entered into with Gaines in July of 1974?

A I went down to get the money to buy a new

tractor and trailer and at the time my common-law wife Delores Thompson was with me ad she needed $6,500 for repairs on her house and he loaned the money.

Q Did you get $6,500 in cash?

A Yes.

Q Was that made out to you in a check to you and to Delores?

A It was made out to me.

Q What were the terms of the agreement that you entered into, the actual agreement, in connection with the $6,500 cash payment?

A I believe that was to be repaid in 60 months.

MR. KIMELMAN: Can we mark these?

THE CLERK: Group of documents marked Government's Exhibit 29 for identification.

(So marked.)

THE CLERK: A one-page document marked Government's Exhibit 30 for identification.

(So marked.)

MR. KIMELMAN: Your Honor, I'd like the opportunity to show these to defense counsel and perhaps there could be a stipulation as --

THE COURT: Are you offering them?

MR. KIMELMAN: I am offering them.

THE COURT: Any objection, Mr. Cohn, Mr. Iannuzzi?

MR. COHN: We have no objection at all. I'm showing it to Mr. Iannuzzi now.

THE COURT: All right.

MR. IANNUZZI: I have no objection.

THE COURT: Let them be marked.

THE CLERK: Government's Exhibits 29 and 30 previously marked for identification are now marked in evidence.

(So marked.)

BY MR. KIMELMAN:

Q I show you what's been marked as Government's Exhibit 29 in evidence and ask you if that refreshes your recollection as to the agreement you entered into in July of 1974?

A Yes.

Q That was an agreement for how many months at how much per month?

A Sixty months at 922.

Q $922 a month; is that right?

A Yes.

Q And the agreement that you entered into was in regards to what type of equipment?

A A 1974 Kenworth Tractor and Trailer, '71 Hobbs trailer.

Q So in addition to the $6,500 in cash you received, Gaines would finance you for a 1974 Kenworth?

A Yes.

(Continued next page.)

Q Did you purchase a 1974 Kenworth?

A No, I didn't.

Q Did you purchase a Hobbs Reefer Trailer?

A Yes.

Q How much did you purchase the Hobbs Reefer Trailer for?

A Eight hundred -- eight hundred two hundred thirteen dollars.

Q Eight hundred?

THE COURT: You mean eight thousand?

THE WITNESS: I'm sorry, $8,213.

Q So that you then owed Gaines -- you had then gotten from Gaines $6500, plus a thousand; is that correct?

A $8,213, yes.

Q All right. Did there come a time when you substituted for the 1974 Kenworth?

A Yes.

Q Could you tell the Court and jury how that came about?

A From the 1971 Peterbilt, I was in Chicago. I went to trade the tractor in and found out that William Cappiello owed CIT $16,500.

I brought the tractor back to New York, parked it in the lot.

The tractor was taken from my lot and I didn't report it stolen because I felt that William Cappiello had took the truck or CIT had took the truck.

So in November I approached William Cappiello and asked him about it and he said, "Yes, I have the truck. I have it stashed." But he wouldn't tell me where it was.

He says he -- he didn't want them to repossess the truck because he wanted to keep William Cappiello's name clear for credit, and then he agreed to give me a '65 Kenworth Tractor which he had on lease with Gaines Leasing. I can't recall the figure, how much it was, but he turned the tractor over to me, made up an agreement with Mr. Schwartz and the payments was reduced to nine -- $609 and in November business was bad.

Q All right. Let me stop you there for a moment.

In other words, Mignoli agreed to substitute a '65 Kenworth for the Peterbilt that he had taken back from you; is that right?

A Yes.

Q And this '65 Kenworth Mignoli was leasing from Gaines; is that correct?

A Yes.

Q There came a time when you entered into an agreement between you, Cappiello and Gaines where you would

take over Mignoli's obligations for that '65 Kenworth; is that correct?

A Yes, correct.

Q So that in October of 1974, you had this Hobbs Reefer Trailer and '65 Kenworth tractor; is that correct?

A Yes.

Q All right. Now, did there come a time in November, December of '74, when something happened with your business?

A Yes.

Q Could you tell the ladies and gentlemen of the jury what happened?

A At that particular time, work was slow and I felt that I couldn't make the payments to Gaines Leasing. I made an agreement with William Cappiello. I called Mr. Schwartz on the phone and advised him -- I mean, told him of the agreement that we was going to make and he told me that any agreement you make with William Cappiello was alright with him.

Q All right. What is the agreement that you entered into with William Cappiello?

A When I turned the tractor, '65 Kenworth Tractor over to William Cappiello along with the '71 Hobbs Reefer, we made up the agreement. He agreed to give me $5000 and take over the payments of the tractor and relieve me of all

obligations to Gaines Leasing.

Q In other words, you were giving Mignoli back his Kenworth?

A Yes.

Q Plus the Hobbs that you had already leased?

A Yes.

Q Is that correct?

A Yes.

Q In addition, he would assume your obligation of 609 a month, is that correct?

A Yes.

Q In addition, he would give you $5000 cash; is that correct?

A Yes.

MR. KIMELMAN: Mark this, please.

THE CLERK: Document marked Government's Exhibit 31 for identification.

(So marked.)

Q Mr. McGhee, I'll show you what's been marked as Government's Exhibit 31 for identification and I'll ask you if you can identify that piece of paper?

A Yes, I do.

Q What do you recognize that piece of paper to be?

A The sale that -- the agreement that William

Cappiello and I made up.

Q You did this under the name of what company, DFG Enterprises?

A DFG Enterprise.

Q What is the practice of DFG Enterprises to maintain records and keep those records in the ordinary course of business?

A Yes.

Q Did you maintain this document as part of the records of DFG Enterprises?

A Yes.

Q Did you turn over that exhibit, Government's Exhibit 31, I believe, to the United States Attorney's Office?

A Yes, I did.

Q Do you recognize that piece of paper as the document you turned over?

A Yes.

Q Now, on the bottom portion of this piece of paper there is another agreement; is there not?

A Yes, it is.

Q What is that a copy of?

A That's a copy of when I bought the '71 Peterbilt from William Cappiello for $16,500.

MR. KIMELMAN: Thank you.

I offer Government's Exhibit 31.

MR. COHN: I have no objection at all, your Honor.

THE COURT: Let it be marked.

MR. IANNUZZI: I have no objection.

I'd just like to ask, this is not the original document? It is not being offered as such, is it, sir?

I have no objection to it. I was just wondering.

THE COURT: All right, let it be marked.

THE CLERK: Government's Exhibit 31 previously marked for identification was now marked in evidence.

(So marked.)

MR. KIMELMAN: That's the document I received.

Q This agreement whereby Cappiello took over your obligations for the Hobbs and the Kenworth is dated what date?

A December 2, 1974.

Q He agreed to pay you $5000; is that correct?

A Yes.

Q Did he pay you the $5000?

A No, he didn't.

Q Did you turn over the two vehicles to William Cappiello in December of 1974?

A Yes.

Q So that you no longer had possession of either

the Kenworth or the Hobbs after December, the early part of December, 1974; is that correct?

A That's correct.

Q You had called Mr. Schwartz and told him that you and Mignoli were entering into this agreement?

A Yes.

Q Was there any communication from the latter part of December, January, February, March and the first two weeks in April by Gaines or anyone on behalf of Gaines to you concerning your account with Gaines?

A No, it wasn't.

Q You received no letters, no visits during that period of time; is that correct?

A No, I didn't.

THE COURT: No telephone calls?

THE WITNESS: Never.

Q Did you go down to GAines Service Leasing Corporation during the period of time, December when you entered into this agreement with Cappiello until May of 1974?

A You mean, from December until --

Q May of -- excuse me, May of '75.

A No, I didn't.

Q In other words, you did not visit their premises; is that correct?

A No.

Q Now I draw your attention, Mr. McGhee, to April of 1975. On April 21, 1975, did anyone come to your house on the evening of April 21?

A Yes, they did.

Q At approximately what time did you receive a visit?

A Between 12 -- between 11:30 and 12:00 o'clock at night.

Q At night?

A Yes.

Q Were you able to see the vehicle in which this individual or individuals arrived?

A At that night?

Q At that night?

A No, I didn't.

Q What happened when these individuals came to your house?

A They knocked on the door and my common-law wife asked who was it and it was a Spanish accent came out, says "Jack Schwartz."

Q Were you able to hear this conversation?

A Yes, I did.

Q You were at home?

A Yes.

Q You heard a voice with a Spanish accent saying "Jack Schwartz"?

A Yes.

Q Could you tell us the rest of the conversation?

A My wife asked "What do you want?"

He say "I want to see Fred McGhee." She say, "He's not at home." They say "He must be home. His car is in the driveway."

She repeated "He's not home." She says, "Go away."

They left.

About 15 minutes later they returned, wanted to see me again. She told them I wasn't home.

Then they left again.

The following morning they came, about 9:15 in the morning.

Q Were you home at that time?

A Yes, I was.

Q Were you able to see the vehicle they were driving?

A Yes, I did.

Q What type of vehicle was it?

A A yellow Maverick, 2-door.

Q Who came to your door initially?

A Spanish guy.

Q Did you have a conversation with this individual?

A Yes, I did.

Q Do you see the individual you had a conversation with on --

A Do I see him?

Q On April 22nd in the courtroom today?

A Yes, I do.

Q Would you point him out, please?

A The young fellow sitting over there.

THE COURT: Where? What does he look like?

THE WITNESS: Right here (indicating).

THE COURT: Where is he sitting?

THE WITNESS: On the end of the bench with his close haircut.

THE COURT: Let the record show the witness pointed out the defendant, George Sarkis.

Q Has Mr. Sarkis' appearance changed in any way since you saw him in April of 1975?

A Yes, it has.

Q How has it changed?

A He had longer hair. He had a mustache.

Q When you say, "longer hair" could you be a little

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more specific about how long his hair was? Was it more like your hair or more like mine?

A More like yours.

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Q Longer than my hair or about the same?

A About the same.

Q What about the defendant's mouth? Does that appear the same to you as it did in April of 1975?

A As far as I can see it is. You know, I can't see -- I know he had gold in his mouth.

THE COURT: He had what in his mouth?

THE WITNESS: Gold.

THE COURT: Gold teeth, you mean gold capping?

THE WITNESS: Yes.

A Every word he spoke he kind of showed all his teeth (indicating) with a similar smile (indicating).

Q What was the conversation that you had with Mr. Sarkis on that morning?

A He told me that he was from Gaines Leasing, that he came to collect $5,000.

Q By the way, how was Mr. Sarkis dressed that day?

A He had on a blue raincoat. I couldn't get the trousers because it was covered.

Q After he told you that he was from Gaines and he wanted $5,000, what did you say?

A I told him that I had an agreement with William Capiola supposedly taking over all responsibility,

relieving all obligations of Gaines Leasing.

He says, "Well, I don't know anything about that. I just come to collect $5,000."

I says, "I don't have the money."

He says, "Well, I have a job to do. I work for Jack Schwartz. I have to go back with something."

About that time the white male approached the house and I also told him about the lease.

He says, "I know about the lease."

Q Did the white male introduce himself to you when he came up to the house?"

A No, he didn't.

Q Do you know who that white male is?

A Yes, I do.

Q Who is it?

A Grove Ebert.

Q What was the conversation after Grove Ebert came to the door?

A He said he knew of the contract, knew of the agreements, that they came to collect the $5,000.

Q What else was said, if anything?

A I says, "I don't have $5,000. Is there some kind of agreement I can make up with Mr. Schwartz?"

He says, "Well, I don't know. You have to

talk to him."

I said, "Could you call him?"

He says, "Yes, could I use the phone?"

"Sure."

He came in. He said he doesn't get into the office until ten. He made two phone calls. The first phone call he couldn't reach him. The second phone call he didn't reach him. So he walks back to the door and the Spanish guy, he says, "Well, could you come up with half of the money?"

I said, "I don't have any money."

He says, "Suppose we give you a week." Then he changed it. He says, "Gee, I got to leave Friday." He says, "Say about Thursday."

MR. IANNUZZI: I couldn't get the last part.

THE COURT: Mr. Silverman, would you please repeat that.

(Record read)

MR. IANNUZZI: Thank you.

Q Go ahead.

A He asked me could I have $50 or $100 by Thursday.

I said, "I don't know."

He says, "Well, we'll be back Thursday."

He says, "We got to go back with something. I work for Jack Schwartz. He's my boss. We got a job to do."

Q Did he say anything else at that time?

A (No response.)

Q Mr. McGhee, I show you this document and I'll ask you if it refreshes your recollection.

MR. IANNUZZI: Objection, if your Honor please. The witness doesn't indicate he doesn't recall. He was pausing.

THE COURT: Do you recall anything else?

THE WITNESS: Well, there was so much going on, your Honor. I can't exactly remember word for word.

THE COURT: Look at the document. See if it refreshes your recollection as to what else was said.

Q I draw your attention to where my finger is pointing and ask you if that refreshes your recollection as to what else was said by Mr. Sarkis.

MR. IANNUZZI: Objected to, that characterization.

THE COURT: Objection overruled. I'll allow it.

Q Does that refresh your recollection?

A Yes.

THE COURT: Would you please mark it for identification?

MR. KIMELMAN: Very good, your Honor. It is marked as a 3500 exhibit.

THE COURT: Give us the number for the record.

While Mr. Kimelman is doing that, I wanted to call your attention to the fact that the witness is testifying as to conversations with Grove Ebert and the defendant Sarkis. If you credit this witness's testimony, he's talking about an obligation that he says he was sent to collect, indicating that Mr. Schwartz sent him.

Now, Mr. Schwartz wasn't present, as was first told to you. Criminal liability is something that's individual and personal. A defendant normally is not charged with any acts or conversations outside his presence unless there's proof that the party to be charged authorized the statements or the acts. It's evident that's attributable to a person not present through a theory of agency.

In this case the defendant Schwartz and Sarkis are charged with being members of a con-

spiracy to extort extensions of credit, which means an indebtedness, payment of an indebtedness, and we analogize the situation to a lawful partnership. It's an exception to the rule that an individual is chargeable only with what he or she does or what he says. It's something like a legitimate business.

In the conspiracy the partners are called conspirators, in a partnership they are called partners, and a conspiracy has been described as a partnership for criminal purposes.

For example, if A, B and C were in the clothing business and A was a man who bought the clothes, the buyer, B was the man who dressed the windows, and C was the man who took care of the books and acted as cashier, they would all be partners, and anything that any one of them did during the course of the partnership, for partnership purposes, would bind all the partners.

For example, if A, who bought for the partnership, went out and bought a hundred suits of clothing and five dozen pairs of slacks, well, that was for the partnership business, while they were partners. The other two partners are bound by it if they were not present, as long as the purchase was

made. They might not approve what was being done or authorized it. Maybe they would have objected to it, but it's during the partnership business and for the purpose of the partnership.

So I say we analogize that, analogize a criminal conspiracy to a lawful partnership. If, instead of being a lawful clothing store, they decided that they would steal the clothes, for example, hijack, sell stolen clothes, it would still be a partnership, and that would be called a conspiracy and so if A, the buyer, went out and hired some people to do the stealing, well, the other two would be bound by it because it would be the same idea. It would be for the criminal purpose, and every member of the conspiracy would be bound.

So in a case like this, you first listen to the testimony. You wait to see if it's connected with Mr. Schwartz. If it's not, then you don't consider it. You don't charge him with it.

The Government must prove beyond a reasonable doubt that the conspiracy alleged in the indictment existed during the term. The term is said to be between April 18th and July 10th, and, of course, it's alleged to be for the purpose of

using extortionate means to collect the indebtedness that was incurred by Mr. Taylor and Mr. McGhee.

The Government must prove beyond a reasonable doubt that one of the parties, in this case either Mr. Ebert or Mr. George Sarkis, were members of that conspiracy. In other words, that they knowingly and willfully entered into the conspiracy; that this was an understanding that they entered into, aware of the purpose, aware of what they were doing and not just doing it accidentally and doing it voluntarily, intentionally; not by pure accident.

Then anything that any member of the conspiracy does during the term of the conspiracy and to advance the purposes of the conspiracy, which, again, was to collect the indebtedness through extortionate means, is chargeable against the accused, if you find that the accused knowingly and willfully entered into the conspiracy.

If the Government proves all that beyond a reasonable doubt, then whatever one member of the conspiracy does, either Mr. Grove Ebert or Mr. George Sarkis, would bind the accused, if you find that the accused knowingly and willfully entered the conspiracy.

There's another principle, that's the principle of how to treat the evidence, that's an evidentiary rule. There's one that may be rather confusing, but nevertheless criminal liability, in other words, fault, in order to determine whether an accused knowingly and willfully entered into the deal, into the conspiracy, it must be based on evidence, direct evidence, of what the accused said or did. That's where the personal and individual responsibility lies.

In other words, before you may consider the evidence against the Defendant Schwartz, you must first determine whether he's a member of the conspiracy. It seems to be doing it backwards, I know, because the evidence is coming in first.

First you hear Mr. Schwartz's name being mentioned and then I say to you, "Hold this evidence aside." As far as Mr. Sarkis is concerned, that's testimony as to what Mr. Sarkis did. If you credit the testimony, you may consider that as evidence of whether Mr. Sarkis entered the conspiracy. That's testimony of what this witness saw or heard of Mr. Sarkis, but in order to determine whether the Government proved beyond a reasonable doubt that Mr.

Schwartz entered the conspiracy, you have to wait to see whether there's any direct evidence of Mr. Schwartz's participation in it, conversations with Mr. Schwartz, testified to by a witness who had the conversations with him, what other witnesses saw or heard Mr. Schwartz do. That's the evidence you will have to consider to determine whether he entered the conspiracy.

If you then find he did enter the conspiracy, then and only then will you charge this evidence against Mr. Schwartz, if the Government fulfills all the conditions.

It's a lot to take in one bite, but you think about it and during the trial periodically I'll charge you on the same situations as they arise, and ultimately you'll get the full grasp, I'm sure.

Mr. Kimelman, you may proceed.

Q Mr. McGhee, I was asking you do you recall anything else Mr. Sarkis said to you that morning.

A (No response)

Q Do you recall now anything else that he said to you?

A Yes, just before they was leaving, he says "We don't want to hurt you. We don't want to have problems."

Grove Ebert had stepped out on the lawn, and he looked back. He says, "We'll be back Thursday, and you have the money or else we're going to break your fuckin' legs." They left.

Q What was your state of mind when they left, Mr. McGhee?

A At the present time I was frightened because--

MR. IANNUZZI: I'm objecting, if your Honor please.

THE COURT: Objection overruled.

A At the present time I was afraid because I didn't know either one--

THE COURT: When you say "the present time," you're talking about today or are you talking about when that was said?

THE WITNESS: The present time, your Honor--

THE COURT: Now?

THE WITNESS: When it happened.

THE COURT: That's what I mean. You're talking about back on April 21, 1975?

THE WITNESS: Yes.

THE COURT: That's the question.

THE WITNESS: Right.

THE COURT: What was your state of mind at that

time?

THE WITNESS: I was afraid because I didn't know either one of the guys, and had never seen them before and I didn't know what they might do or what they wouldn't do because-- The Spanish guy there (indicating) looked as if he --

MR.IANNUZZI: Objection.

THE COURT: Strike it out. The only question was how you felt. You were in fear. You felt that--

THE WITNESS: My life was in danger.

THE COURT: Probability or likelihood something might happen to you?

THE WITNESS: Yes.

Q By the way, Mr. McGhee, what's the extent of your education?

A Ninth grade.

Q Ninth grade?

A Yes.

Q What did you notice about Mr. Sarkis's appearance?

A At the time he arrived?

Q During that time. Was there anything unusual about his appearance?

A Well, he looks as if he hadn't slept all night. His hair was bushy and he had a lot of pockmarks

in his face. I could smell a slight bit of alcohol on his breath.

Q That was at nine o'clock in the morning; is that right?

A Yes.

Q After they left did you contact anyone about this visit?

A Yes, I did.

Q Who did you contact?

A Detective Gary Cooper from Nassau County.

Q What did you tell Detective Cooper?

A I told him about the incident, what happened at the time. He told me if they come back--

MR.IANNUZZI: Object to what someone else told him, sir.

MR. KIMELMAN: Your Honor, we offer what Detective Cooper replied only as to the state of mind--

THE COURT: I'll allow it as to state of mind, not for the truth of the statement.

You see, one of the issues in this trial is whether the victim, the alleged victim, was placed in fear of injury, so that the conversation he had is admissible only to show the responses of this

witness to indicate his state of mind, whether he was in fear, but not for the truth of what's said.

I'll allow it.

MR. IANNUZZI: If your Honor please, might I have a continuing objection to this line of testimony, or should I make individual objections?

THE COURT: You have a continuing objection.

MR. IANNUZZI: Thank you.

Q What was the conversation with Detective Cooper on that day?

A He told me if they return or-- if they return to call Suffolk County Police Department and contact him immediately.

Q The next day, Wednesday the 23rd, did you have occasion to go down to Gaines'?

A I did.

Q What was the purpose of your going to Gaines' on Wednesday?

A To make an arrangement to pay this obligation which we and Capiola was not paying, I find out, to see if we can come to some sort of agreement and find out why he wasn't paying it, if he knew.

Q Who did you go down to see?

A Mr. Schwartz.

Q What was your state of mind when you went to see Mr. Schwartz on that day?

A Well, I was afraid for my family, myself, and I wanted to get it straightened out because I wanted no further problems.

Q Did you see Mr. Schwartz on April 23, Wednesday?

A Well, for brief minutes.

Q What was the conversation that you had with Mr. Schwartz at that time?

A At that particular time I told him I came down to see what we would come to some kind of agreement with this money, this loan, and he said, "Well, come in," and my common law wife ~~signed~~ Son with me at that time, Ray Thompson. My wife wanted to take him as a witness to see what was happening.

Mr. Schwartz would not permit him to come in. He closed the door and we left.

Q And Mr. Schwartz would not see you?

A He said he didn't want to talk.

Q I draw your attention to the evening, the late afternoon and early evening of Wednesday, April 23, 1975. Did you see Ebert and Sarkis at your house again?

A Yes, approximately around 5:30 or 6:00 I believe.

Q When had you gone to see Mr. Schwartz?

A That morning.

Q That morning?

A Yes.

Q This is five or six the same day; is that correct?

A Yes.

Q Was there a conversation at your door between Sarkis and Ebert and a member of your family?

A Yes, when they rang the door bell my daughter answered the door and she told them that I wasn't home.

Q Were you home?

A Yes, I was.

Q Did you see what kind of car Ebert and Sarkis were driving on this occasion?

A Yes, an Oldsmobile; it was gold.

Q Did they then leave?

A Yes, the left. I left a short time after them.

Q You left the house a short time after them?

A Yes.

Q Did you leave in your automobile?

A Yes, I did.

Q On this drive that you took did you see anything?

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A Yes. I seen the Oldsmobile parked at Danny's Den at Jericho Turnpike and Old Country Road.

Q How far away is Danny's Den from your house?

A Six blocks.

MR. KIMELMAN: Mark this for identification.

THE CLERK: Large photograph marked Government's Exhibit 32 for identification.

(So marked)

Q I show you what's been marked as Government Exhibit 32 for identification (handing) and ask you if you can identify the photo.

A Yes.

Q What do you identify that to be?

A Danny's Den, the car was parked here (indicating).

Q The car was parked--

A In the front, the right side.

Q Over here, where I'm indicating on the right side (indicating)?

A Yes. This area here.

THE COURT: Suppose you put an X mark where you say the car was, marked in a brown crayon.

Q Make it larger, Mr. McGhee.

A (Witness complies.)

THE COURT: Put your initials there so we remember who it is who marked it.

(Witness complies)

MR. KIMELMAN: Your Honor, the Government would offer Government Exhibit 32.

THE COURT: Any objection?

MR. COHN: I certainly don't see what the picture of an outside of the bar is, but--

THE COURT: If the witness was able to testify that he saw the car there, certainly the picture is admissible.

MR. COHN: I certainly have no particular objection.

THE COURT: Do you, Mr. Iannuzzi?

MR. IANNUZZI: No.

THE COURT: Let it be marked.

THE CLERK: Government Exhibit 32, previously marked for identification, now marked in evidence.

(So marked)

MR. KIMELMAN: Your Honor, I ask if I can pass this to the jury.

THE COURT: The foreman can have a look at it and pass it to her gentleman on the left and it will go counterclockwise. You can continue examining

while they're looking at it.

MR. KIMELMAN: Thank you.

(Said photograph handed to Juror No. 1.)

Q After you observed the same Oldsmobile in the parking lot of Danny's Den, what did you do?

A I went immediately to the shop and went to the telephone booth and I called Gary Cooper.

Q That's Detective Cooper?

A Organized crime in Nassau County.

Q This is the same detective that you had contacted on Tuesday when these men first came; is that correct?

A Yes.

Q What was the conversation that you had with Detective Cooper and--

MR. KIMELMAN: Your Honor, again we offer this as to state of mind.

THE COURT: I'll allow it solely to indicate how the alleged victim felt at the time, not for the truth of what was said.

MR. IANNUZZI: I'm objecting to it as hearsay.

THE COURT: You have an exception.

Q What was the conversation with Detective Cooper?

A I called him and he wasn't in, so they got hold to him right away. He called me back on the phone and I explained to him that the two fellows was back in my house again in an Oldsmobile, parked at Danny's Den, Jericho Turnpike.

He told me if they came back to the house to call Nassau County -- Suffolk County Police Department right away and call him immediately.

Q After the phone call to Detective Cooper, what did you do?

A I went back home.

Q Approximately what time did you return home?

A About 7:15, 7:30.

Q Did you remain at home?

A Yes, I did.

Q Did you see these individuals again that evening?

A No, I didn't. They called.

Q Approximately what time was the phone call received?

A I believe it was around about eight; I'm not sure.

Q Who answered the telephone?

A My wife.

Q What was the conversation that you heard?

A They had a conversation--

THE COURT: What did you hear your wife say?

Q What did you hear your wife saying?

A That's what I'm --

IANNUZZI: Objection.

THE COURT: I'll allow it. The same reason.

A The conversation of my wife, I heard her say, "Well, he's not here." Their conversation I couldn't hear anyway.

THE COURT: You heard her say, "He's not here"?

THE WITNESS: Yes.

A The conversation goes on to say--

THE COURT: What you heard your wife say?

THE WITNESS: Yes.

A (Continuing) She asked them what did they want with me," and they again told her--

THE COURT: You didn't hear what they told her.

THE WITNESS: No, she told me.

THE COURT: No, I want to know what you heard her say.

THE WITNESS: All right.

A (continuing) She asked them what they wanted with me. Then she says, "He doesn't owe you money, $6500. I owe you the $6500." The conversation ends.

Q Did there come a time, Mr. McGhee, when you heard something outside your house?

A Yes, about 9:50 that night.

Q What did you hear, Mr. McGhee?

A Something, if it was an explosion.

Q How would you describe the sound of this explosion?

A Phoof. Gasoline or something. It went off.

Q Did you look out the window to see what was happening?

A Immediately I looked out the window and I seen the garage on fire, my car was in the garage, which is on fire also.

I heard footsteps running from the garage immediately, I grabbed my pants and coat and ran outside and tried to put the car out.

THE COURT: Tried to put the fire out?

THE WITNESS:Tried to put the car out. The fire.

THE COURT: Take the car out of the garage?

THE WITNESS: I was going to take it out.

The fire was on the back of the car and in front of the garage.

THE COURT: You were trying to put the fire out?

THE WITNESS: With my coat.

Q You said that the car itself, the back of the car, was on fire; is that correct?

A Yes.

Q Were you able to observe anyone running from your house?

A I couldn't--

MR. IANNUZZI: If your Honor please, is it possible that the United States Attorney doesn't lead the witness?

THE COURT: It's possible.

MR. IANNUZZI: I would object to him doing so.

THE COURT: Objection overruled, I'll allow it.

(Continued on the next page.)

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Q Were you able to observe anyone leaving from your house at the time of the explosion?

A I can only hear footsteps running out the driveway. I couldn't see anyone. It was dark.

Q And after you found that you were unable to contain the fire, what happened?

A I called the Fire Department and the Police Department.

Q Were you able to observe the car and garage after the fire was put out?

A No.

Q Did you look at the car in the garage after it was put out?

A Yes, I did.

MR. KIMELMAN: May we mark these?

THE COURT: In a series. The next number is what?

THE CLERK: Photograph marked Government Exhibit 33.

THE COURT: Call them A, B, C, D, unless you have them already numbered.

THE CLERK: Either way.

THE COURT: 33A, B, C, D.

MR. KIMELMAN: While we are waiting, your Honor, may I go on?

THE COURT: Yes.

Q Was your car in the garage at the time?

A Yes, it was.

Q What type of car did you own?

A '73 Cadillac.

Q What else was in the garage at the time?

A A lot of antiques. And there was a number of things. I really can't itemize all of them.

Q Did you have a large gas tank in the garage?

A Yes.

Q What was the purpose of that gas tank?

A I had gotten that gas tank from WilliamCappiello for fuel purposes.

Q Had you ever used that gas tank?

A No, I hadn't.

Q Was it full or empty at the time?

A It was empty.

Q Had it ever been full?

A No.

Q By the way, Mr. McGhee, do you recall on that evening whether the garage door was open or closed?

A The garage door was open. It had a broken spring on it.

THE CLERK: The other photographs are marked.

MR. KIMELMAN: Which ones?

THE CLERK: Six photographs marked Government Exhibits 33A through 33F inclusive for identification.

(So marked.)

Q Mr. McGhee, I will show you first Government's Exhibit 33 and ask you if you can identify this photograph.

MR. IANNUZZI: If your Honor please, I object.

THE COURT: It's not in evidence. Show it to the witness privately without displaying it to the jury.

MR. IANNUZZI: Thank you, sir.

Q Can you identify this photograph?

A My house, and this is my bedroom (indicating).

Q Is that the way your house appeared in April of 1975?

A Yes.

Q I show you what has been marked Government's Exhibit 33A. I ask you if you can identify this photograph?

A This is my garage. This is my bedroom (indicating).

Q Was that after the fire?

A After the fire.

THE COURT: The garage is detached from the house?

THE WITNESS: Yes.

THE COURT: Facing your house, the garage is to the left?

THE WITNESS: To the right. That is the side of the house.

THE COURT: This is your house?

MR. KIMELMAN: Looking at the house it is to the left.

THE WITNESS: The garage is to the right.

THE COURT: Coming out of your house the garage is to the right?

THE WITNESS: Facing to the left, yes.

Q I show you what has been marked Government's Exhibit 33B and ask you if you can identify this photograph?

A Yes, I do. That is my car.

Q After the fire?

A After the fire.

THE COURT: Does that picture fairly and accurately represent what the car looked like immediately after the fire?

THE WITNESS: Yes.

Q I show you what has been marked as Government Exhibit 33C and I ask you if that is a fair and accurate representation of the contents of your garage afterwards?

A Yes.

Q The same question as to 33D?

A Yes, my garage, part of the car.

Q And 33E?

A Yes, that is the rear of my car.

Q And 33F?

A Yes, the rear.

MR. KIMELMAN: Your Honor, the Government would offer 33, 33A through F.

THE COURT: Will you please show it to counsel and see if there is any objection?

MR. KIMELMAN: Yes, your Honor.

(Pause.)

MR. IANNUZZI: Perhaps we can look at it together to save some time.

(Pause.)

THE COURT: Did you say there were six pictures?

THE CLERK: Seven, your Honor. I marked one first and then I marked them with the letters afterwards.

MR. COHN: From the photographic standpoint, I don't have any objection except to make the point your Honor did to the jury --

MR. KIMELMAN: I object to any colloquy.

THE COURT: It has no relationship to Mr. Schwartz. It's not charged against Mr. Schwartz unless the

Government proves all the conditions, the same as a conversation, act or conversation, if the jury finds these acts are attributable to either Mr. Grove Ebbert or Mr. Sarkis or both, and you find that either one, the one that performed -- if you find the testimony credible and you find from all the circumstances that that's what it shows, it's chargeable against that individual unless the Government proves that a conspiracy existed as alleged in the indictment, that this was an act to carry out the purpose of the conspiracy, and you find that Mr. Schwartz knowingly and willfully entered into that conspiracy -- if the Government doesn't prove all that beyond a reasonable doubt, just disregard it as against Mr. Schwartz.

MR. COHN: Thank you very much. I have no objection.

MR. IANNUZZI: May I have a question or so on the voir dire, sir?

THE COURT: I hope it is a voir dire, Mr. Iannuzzi.

MR. IANNUZZI: It certainly is.

THE COURT: The only question is, does this fairly and accurately represent the condition after the fire? Cross-examination is for a later time.

MR. IANNUZZI: Certainly.

VOIR DIRE EXAMINATION

BY MR. IANNUZZI:

Q When were the photographs taken, if you know?

MR. KIMELMAN: Objection.

THE COURT: Objection sustained.

MR. IANNUZZI: Your Honor, if it is going to represent the fire --

THE COURT: Mr. Iannuzzi, I don't care if they were taken the day after or just this morning. The only question is, does it fairly and accurately represent the condition as it existed after the fire.

MR. IANNUZZI: At what time after the fire, that's all.

THE COURT: Objection sustained.

MR. IANNUZZI: I have no objection to the photographs.

THE COURT: Let them be marked.

MR. IANNUZZI: Other than my objection --

THE COURT: I understand.

THE CLERK: Government's Exhibit 33 and 33A through F, previously marked for identification now marked in evidence.

(So marked in evidence.)

MR. KIMELMAN: Your Honor, after these are marked, I would like the same opportunity to pass them to the jury.

THE COURT: Suppose you give four to the foreman and three to juror No. 7? And they can pass them on.

(At this time above exhibits being passed to the jury for their inspection.)

THE COURT: You can continue your examination.

MR. KIMELMAN: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. KIMELMAN (Continuing):

Q After the burning of the garage, Mr. McGhee, did you make statements to the Suffolk County Police Department?

THE COURT: Objection sustained.

Q Did there come a time, Mr. McGhee, when you made certain phone calls to Grove Ebbert?

A Yes, I did.

Q When those phone calls were made to Grove Ebbert, were they recorded?

A Yes.

Q Where were the phone calls made from?

A My house.

Q Where were they made to?

A Grove Ebbert.

MR. KIMELMAN: Can you please mark this?

THE CLERK: Tape marked government's Exhibit 34 for identification.

(So marked.)

(continued next page)

Q Mr. McGhee, I show you what has been marked as Government's Exhibit 34 for identification and I ask you if you can identify that tape cassette.

A Yes, I can.

Q Haveyou listened to that?

A Yes, I have.

Q Does that tape cassette contain a fair, true and accurate representation of your conversation with Grove Ebbert on April 26, 1975?

A Yes, it does.

MR. KIMELMAN: Your Honor, we would offer Government's Exhibit 34.

THE COURT: Any objection?

MR. COHN: As far as Mr. Schwartz, none at all, except under your Honor's standing instruction that this is not a conversation with Mr. Schwartz.

THE COURT: It's also true of Mr. Sarkis.

MR. IANNUZZI: I make the same objection.

THE COURT: Subject to the connecting proof that I indicated before. If the Government doesn't prove all the conditions, particularly if the Government fails to prove a conspiracy, that this conversation was part of that conspiracy, to further the purpose of the conspiracy, which was to collect

an indebtedness by extortionate means, then it is not chargeable unless the Government also proves beyond a reasonable doubt that the accused knowingly and willfully entered into the conspiracy.

MR. COHN: Thank you very much.

THE CLERK: Government's Exhibit 34 previously marked for identification now marked in evidence.

MR. KIMELMAN: Your Honor, I would be correct in stating that the Government and counsel have agreed as to transcripts to be used to aid the jury.

THE COURT: Is that true?

MR. COHN: Yes.

MR. IANNUZZI: Yes sir.

THE COURT: Are you ready to distribute them?

MR. KIMELMAN: They have been previously marked. The conversation that we will play now has been previously marked.

THE COURT: You have other conversations in there?

MR. KIMELMAN: There are other conversations we have not referred to, but they are indexed. This will be letter A.

THE COURT: I will ask the jury to look at letter A. You may only look at what is in evidence.

What is in evidence, mind you, is the tape that recorded the conversation. The transcript is only an interpretation of the tape. The evidence is the tape. The transcript is only a guide because it is sometimes difficult particularly at first hearing to understand what is said.

Now, these headsets are fairly good. I think you will be able to hear what was said, but follow it along with the transcript, always keeping in mind that the evidence is what you hear from the tape. The transcript is just an aid.

Go only to the first transcript and nothing else. Nothing else is in evidence so please don't thumb through it.

MR. KIMELMAN: Judge Mishler?

THE COURT: Yes?

(The following took place at side bar.)

MR. COHN: Mr. Kimelman, how long are you going to be with the direct?

MR. KIMELMAN: I will certainly go beyond 5:30.

MR. COHN: I know you are anxious to move ahead, your Honor.

THE COURT: Are you ready to turn over the

3500 material?

MR. IANNUZZI: We got that.

MR. KIMELMAN: I did that before he took the stand.

MR. IANNUZZI: We haven't been able to look through it though.

MR. COHN: I know your Honor wants to move forward. I have no objection to going as late as you want to go and finish the direct examination of this witness. I will be ready with the cross tomorrow morning.

THE COURT: If we can finish the direct --

MR. KIMELMAN: The problem is there are three tapes.

THE COURT: What Mr. Cohn is saying, if you finish your direct he feels you are through and now he knows he can start his cross-examination in the morning. But if the Government said, I forgot something and do you mind --

MR. COHN: I don't care about that.

THE COURT: I think it's good for the direct to go in and then give the defendants a chance to organize their cross-examination, it goes much quicker.

MR. IANNUZZI: I understand that. I want to be able, if possible -- I have to pay him $20 just to bring him back tomorrow.

THE COURT: Is he in the courtroom? I want the police officer to wait.

MR. KIMELMAN: Judge, I haven't seen him since lunchtime.

THE COURT: Okay.

(The following took place in open court.)

MR. IANNUZZI: If it please the Court, in reference to the transcript, I indicated that I had no objection on behalf of Mr. Sarkis, I have no objection to the fact that it accurately represents what is on the tape, not in any fashion conceding the conspiracy or anything to that effect.

THE COURT: Of course. YOu are saying this transcript represents what is on the tape and nothing more.

MR. IANNUZZI: Yes sir.

MR. COHN: With your kind permission, can I do a little homework and my partner Mr. Rosen will take over?

THE COURT: Fine.

(At this time Mr. Cohn left the courtroom.)

(The following took place at side bar.)

THE COURT: I thought Mr. Cohn could take over and see the Suffolk policeman but he can't.

(The following took place in open court.)

THE COURT: I think we are ready now.

(At this time the tape was played.)

THE COURT: All right, please collect all the books.

MR. KIMELMAN: I think it will be just as easy to have them hold it.

THE COURT: You have another one coming up? Close the books and don't read any further. But keep them with you.

DIRECT EXAMINATION

BY MR. KIMELMAN (Continuing):

Q Mr. McGhee, that conversation was on April 26, 1975, three days after your garage had burned, is that correct?

A Yes.

Q Did you have occasion to call Mr. Ebbert again two days later on April 28, 1975?

A Yes, I did.

THE COURT: April 26 was what day of the week, if you recall?

THE WITNESS: I don't recall.

THE COURT: I find that April 28 was a Saturday. April 28 was a MOnday, is that right?

THE WITNESS: I really don't know for sure.

THE COURT: I will take judicial notice of that.

Q Was the conversation on Monday, April 28, with Grove Ebbert again recorded?

A Yes.

Q Have you listened to a recording, cassette recording, of that conversation?

A Yes.

THE CLERK: Cassette tape marked Government's Exhibit 35 for identification.

(So marked for identification.)

Q I show you what has been marked Government's Exhibit 35 for identification and ask you if you can identify that cassette of the recording you listened to?

A Yes.

Q Is that Exhibit 35 a fair and accurate representation of the conversation you had with Grove Ebbart on April 28?

A Yes, it is.

MR. KIMELMAN: Your Honor, with the Court's

permission, we would play Government's Exhibit 35 and it is Number 3, if there is no objection.

THE COURT: Any objection except as to --

MR. ROSEN: Same ruling, no objection.

THE COURT: Subject to connection, same conditions I charged you on.

THE CLERK: Government's Exhibit 35 previously marked for identification now marked in evidence.

MR. KIMELMAN: We make reference to letter B of the transcript that everyone has.

THE COURT: April 28, 1975, look at the tap the booklet has and look at only B. Don't go any further.

I think we are ready.

MR. KIMELMAN: Ready?

MR. ROSEN: Yes.

(At this time the tape was played.)

THE FORELADY OF THE JURY: It's not right.

MR. IANNUZZI: It's not in agreement with the transcript, your Honor.

MR. KIMELMAN: This refers to another conversation we did not make a transcript of.

THE COURT: Let the record show that what the jury heard was a phone call and somebody said,

"Mr. Grove, please," and some girl answered and said, "He's not in," and that is all the jury heard. Everything that the jury heard must be on the record.

(continued next page)

7pml 2 (Tape continues to be played.)

3 THE COURT: Do you intend the third one to be
4 introduced?

5 MR. KIMELMAN: I do, your Honor.

6 THE COURT: All right.

7 MR. KIMELMAN: It will take --

8 THE COURT: Keep the books, but do not look at
9 the other transcript yet.

10 MR. KIMELMAN: That is a substantially longer
11 conversation.

12 THE COURT: All right. I understand that you
13 are willing to wait until we listen to it.

14 I'd like to suspend about 5:30. It may take a
15 little longer because of the tape and then we will
16 suspend for the day.

17 All right.

18 MR. ROSEN: Fine.

19 BY MR. KIMELMAN:

20 Q Before we play the third tape, Mr. McGhee,
21 could I ask you what your state of mind was as you were
22 making these conversations to Mr. Ebbert?

23 A Well, I was afraid that Mr. Schwartz would
24 send somebody else back to my house again.

25 MR. ROSEN: Objection.

THE COURT: Strike out the answer as not responsive.

Were you in fear that something would happen to you if you didn't pay this debt?

THE WITNESS: Yes, I was.

THE COURT: All right.

Q After your conversation with Mr. Ebbert, did you feel that he was speaking on behalf of Mr. Schwartz?

MR. ROSEN: I object, your Honor, what he felt.

THE COURT: Objection sustained.

MR. KIMELMAN: Your Honor, again we offer this only as to his state of mind.

THE COURT: His state of mind has nothing to do with his inference from all the circumstances. This is a matter for the jury at the end of the case.

MR. KIMELMAN: Very good, Judge.

BY MR. KIMELMAN:"

Q Mr. McGhee, did there come a time when you went down to Gaines Service Leasing Corporation to see Jack Schwartz?

A I think we went through that.

Q No. I'm talking about after your conversations with Grove Ebbert?

A Yes, I did.

Q Was this in May 2, 1975?

A Yes.

Q I think, as you indicated before, this was the first time that you had been down --

MR. ROSEN: I object, your Honor, I think the witness should testify instead of Mr. Kimelman.

THE COURT: No. Overruled.

I will allow leading questions as long as they are not prejudicial. It saves a lot of trial time.

MR. ROSEN: Thank you, your Honor.

Q That you'd been down there to see him on April 22nd, the day after these men first came to your house; is that correct?

A Yes.

Q All right. So from April 22nd until now May the 2nd; is that correct?

A Yes.

Q Were you wearing any device on your person that would record conversations?

A Yes, I was.

Q Could you just briefly explain how this device was put on your person?

A I was -- in my back, they -- the recorder was in

my back and the mike was over my left breast.

THE COURT: What did the mike look like?

THE WITNESS: A fine, small item that -- like a pin, something like this (indicating).

Q Did you have a conversation with Jack Schwartz at Gaines on May the 2nd?

A Yes, I did.

MR. KIMELMAN: Mark this, please.

THE CLERK: Yes.

Tape marked Government's Exhibit 36 for identification.

(So marked.)

Q Have you listened to a recording of that conversation that you had on May the 2nd?

A Yes, I have.

Q I show you what's been marked as Government's Exhibit 36 and ask you if you can identify this cassette recording?

A Yes, I do.

Q Is that the cassette recording that you have listened to?

A Yes.

Q Is it a fair and accurate representation of the

conversation that you had with Jack Schwartz on that day?

A Yes, it is.

MR. KIMELMAN: Thank you.

Your Honor, we'd offer Government's Exhibit 36.

THE COURT: Any objection other than that already stated?

MR. IANNUZZI: No sir; same objection.

THE COURT: It may be marked on the subject and conditions that I charged the jury on.

MR. KIMELMAN: Your Honor, may I suggest that the same objection is not forthcoming from Mr. Schwartz?

THE COURT: It does not concern Mr. Schwartz.

MR. ROSEN: I didn't stand up, your Honor.

THE COURT: If this is a conversation with MR. Schwartz and you credit it, of course it is chargeable against Mr. Schwartz.

There is no showing that Mr. Sarkis was there, and it shows that he was not there, so the conditions refer to Mr. Sarkis.

THE CLERK: Government's Exhibit 36 previously marked for identification is now marked in evidence.

(So marked.)

MR. KIMELMAN: This, of course, your Honor, is

Letter C in the Government's transcript.

THE COURT: Yes.

Now it may be that this tape will be a little more difficult to understand, so try to pay very strict attention to the tape and hopefully the transcript will be an aid to the jury.

(Continued next page.)

MR. KIMMELMAN: Your Honor, just one more housekeeping chore.

Throughout this tape there are periods where there are pauses and unrelated background conversations. If the Court and defense counsel wish, we can play the tape in its entirety; however, we are prepared to skip portions where there are pauses or unrelated background conversations.

THE COURT: Any objection to that?

MR. ROSE: I don't know if the tape is the way it was originally.

THE COURT: Then play the whole thing.

MR. KIMELMAN: Thank you, Judge.

(Tape being played before the jury.)

(Pause of tape)

MR. KIMELMAN: Judge Mishler, it's my opinion after listening to these and reading the transcripts, if we play it through without excerpting pauses, it would take a minimum of forty-five minutes to play this tape through.

THE COURT: How long will it take to get to the conversation?

AGENT McMULLEN: We should begin--

THE COURT: Are we ready to begin?

MR. KIMELMAN: There are substantial passages where Mr. Schwartz is on the telephone with the background that take minutes at a time.

THE COURT: Why don't we get that part of the conversation? We'll release the jury and we'll stay here with the lawyers to see if the jury should hear it.

MR. ROSEN: We consented to the transcript of the actual words that we have been able to make out. It is our position the background is as poor as anything else.

THE COURT: Then we'll play it a little while longer. I won't keep the jury until six o'clock. We'll go for another five or ten minutes, then we'll quit, continue tomorrow.

MR. KIMELMAN: Very good, Judge.

(Tape continues to be played)

(Continued on the next page.)

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THE COURT: I think we will suspend at this point.

You may step down, Mr. McGhee. YOu come back tomorrow at 10:00 o'clock.

THE WITNESS: Okay, fine.

MR. KIMELMAN: Maybe the jury can leave them on their seats.

THE COURT: Leave the transcripts on the seats. Hang the earpieces across the arm of the chair.

We will be using them tomorrow and again throughout the trial.

I would like to advise the jury not to talk about the case and keep an open mind. When you reassemble tomorrow don't talk about it amongst yourselves. The case will continue promptly at 10:00 o'clock tomorrow. That means you should come into the courthouse at 9:30 or 20 of 10:00, register first downstairs, and then come to the jury room adjoining the courtroom.

The jury is excused.

(The jury left the courtroom.)

THE COURT: I don't want the defendants to leave the courtroom until the jury leaves the building. Please be seated, Mr. Sarkis. You can leave, Mr. McGhee, if you want to. Tomorrow morning.

THE COURT: Good morning. I think we are ready to continue from where we left off last night.

Mr. McMullen, will you please continue?

MR. KIMELMAN: Your Honor, if I could have just a moment to redistribute these?

May we begin, your Honor?

THE COURT: Please do.

MR. KIMELMAN: Mr. McGhee, will you take the stand?

F R E D M C G H E E , called as a witness, having been previously sworn by the Clerk of the Court, resumed the stand and testified further as follows:

MR. KIMELMAN: May we begin, your Honor?

THE COURT: Please do.

Has everyone got a headset?

I think we are ready.

MR. KIMELMAN: Okay.

(Tape continues to be played.)

MR. KIMELMAN: Your Honor, may I ask the witness a question?

THE COURT: The Jury may be excused.

We will stop for a few moments. The Jury may be excused.

(Jury excused.)

MR. KIMELMAN: Your Honor, I'd like to ask the witness to identify, if he can, the individual who was just talking to Jack Schwartz, not on the phone, but in person.

THE COURT: We didn't have to excuse the Jury for that.

Of course you may.

MR. KIMELMAN: I just said I wanted to ask the witness a question.

THE COURT: All right. Seat the Jury.

I'm sorry. I didn't understand. I thought you had to question something on the tape. I thought it was a question as to whether it should be heard by the Jury.

MR. KIMELMAN: No.

THE CLERK: The forelandy mentioned to me that she didn't know what page to start on and she was rummaging through the pages.

MR. KIMELMAN: All right. We can tell her.

THE COURT: What page did you start?

MR. KIMELMAN: Page 6 now, Judge.

THE COURT: Page 6.

MR. KIMELMAN: We're on "6," right now.

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MR. IANNUZZI: Started on "4."

MR. KIMELMAN: Started on "4."

THE COURT: All right. Seat the Jury.

MR. KIMELMAN: Do you know who I am talking about?

THE COURT: I beg your pardon?

THE WITNESS: Yes.

MR. KIMELMAN: No. I was talking to the witness, Judge.

(Jury present.)

THE COURT: This delay was my fault. I thought Mr. Kimelman was asking for a ruling but he said he wanted to ask the witness some question.

I understand the foreman didn't know where we stared. He started at Page 4. We are now at Page 6.

All right, Mr. Kimelman.

DIRECT EXAMINATION

BY MR. KIMELMAN: (Cont'd):

Q All right.

Mr. McGhee -- take -- can you hear me?

A Yes.

Q Okay.

Mr. McGhee, you just heard some background

conversation between Jack Schwartz and another man.

Could you identify the other man?

A Yes.

Q Who is that?

A Sy Roth.

Q Was he present in the room while you were having this conversation with Jack Schwartz?

A Most of the time.

MR. KIMELMAN: Thank you.

THE COURT: All right. We will continue now. We are at Page 6.

(Tape continues to be played.)

MR. KIMELMAN: Your Honor, I'd like to ask the witness another question.

THE COURT: Go ahead.

BY MR. KIMELMAN:

Q Mr. McGhee, when you made that last statement to Mr. Schwartz about your father being in a wheelchair, did he make any response?

A No, he didn't.

Q Was he doing anything or was he looking at you at the time?

A I believe he was writing in a book.

Q Did he appear to hear you?

A Yes, he heard me but he made no comment.

MR. KIMELMAN: Okay.

THE COURT: Did he appear to hear you?

MR. COHN: Asking this witness if he heard what somebody else heard.

THE COURT: That was the question. There is no objection to it.

MR. COHN: I am objecting to it as to form, your Honor.

THE COURT: All right. Go ahead.

MR. KIMELMAN: Go ahead.

(Tape continues to be played.)

BY MR. K.

Q Mr. McGhee --

THE COURT: Wait until the jurors have taken the earpieces off.

Mr. Kimelman wants to ask the witness a question.

Q Did you hear Mr. Schwartz talking on the phone just now?

A Yes, I did.

Q And did you hear him say that there had been no billings on your account from December til May?

A Yes, I did.

MR. KIMELMAN: Thank you.

THE COURT: Go ahead.

(Tape continues to be played.)

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(Continued on next page.)

BY MR. KIMELMAN:

Q Is that the last conversation you had with Jack Schwartz or anyone from Gaines, Mr. McGhee?

A Yes.

MR. KIMELMAN: Will you mark this for identification?

THE CLERK: Photo marked Government's Exhibit 37 for Identification.

(So marked.)

Q I show you what has been marked as Government's Exhibit 37 for Identification, and ask you if you can identify that.

(Handing.)

A Yes, that's the gas station about eight blocks from my house on Jericho Turnpike and Park Avenue.

MR. KIMELMAN: Your Honor, we offer this subject to further connection.

THE COURT: Any objection, gentlemen?

MR. ROSEN: No objection.

THE COURT: Subject to connection.

THE CLERK: Government Exhibit 37 previously marked for identification, now marked in evidence.

(So marked.)

Q Mr. McGhee, to the best of your knowledge,

has Gaines ever instituted any legal proceedings against you?

A No.

Q In connection with any money that you owed them?

A No.

Q By the way, Mr. McGhee, in connection with that reefer, the Hobbs reefer trailer that you got from Gaines on that lease, what was the price of that Hobbs reefer trailer?

A $8,213.

Q Had you placed any deposit with Fruehauf Corporation prior to Gaines obtaining the vehicle?

A Yes, I gave them a check from DFG Enterprises, $213.

Q $213?

A Yes.

Q You left the check with Fruehauf in the amount of $6,500?

A No.

Q Were you reimbursed by Gaines in the amount of $6,500 in connection with that Fruehauf --

A No. --

Q Excuse me, the Hobbs reefer.

A No.

MR. KIMELMAN: I have no further questions.

THE COURT: Will you come to side bar for a moment, gentlemen.

(The following occurred at side bar.)

THE COURT: I want to make sure in the light of Mr. Iannuzzi's statements, that you have turned over all the 3500 material.

Any question in your mind about it?

MR. KIMELMAN: No.

MR. IANNUZZI: The difficulty included in Mr. Kimelman's 3500 material is that Mr. McMullen obtained from the Suffolk County Police signed statements that he made under oath to Suffolk County.

We do not have the actual signed document. I was just wondering about the problem of showing them something that just has a typed name without a signature.

THE COURT: Where are the originals?

MR. KIMELMAN: I'll check.

MR. COHN: I'm ready to go forward directly.

THE COURT: I want to make sure the 3500 material is turned over.

Mr. Iannuzzi has asked the Government to do his investigation for him with the Suffolk County police.

MR. IANNUZZI: Not at all.

THE COURT: He's calling for 3500 material, "Give me the 3500 material that Suffolk County has."

MR. IANNUZZI: The 3500 material turned over is what I want, the originals, not signed.

THE COURT: Do you have the originals.

MR. KIMELMAN: Yes.

THE COURT: They will be produced.

MR. KIMELMAN: We have not the original statements. We have copies of the originals that Suffolk County turned over to us.

THE COURT: Do you have the signature on them, the original statement that Mr. McGhee signed?

MR. KIMELMAN: Yes, but a copy.

THE COURT: That's all right. It's a Xerox copy.

MR. KIMELMAN: Presumably Xerox.

THE COURT: Turn over everything you have, the originals, if they're original copies, or copies of original. I don't care.

MR. IANNUZZI: That's all I'm asking for.

MR. COHN: I'm ready to go forward. I would want some time before I conclude the cross, a short recess which I would like to coincide with what your morning plans would be, 35 minutes or an hour.

THE COURT: Befor you conclude the cross?

MR. COHN: In other words, I have some material that just came in that I haven't read yet.

I'm ready to go ahead now.

THE COURT: Maybe around the lunch hour, so you can thumb through it over a sandwich.

MR. COHN: I'll be through with him before then.

MR. KIMELMAN: The agent can get them right now. He has them up in his file.

THE COURT: He ought to get them.

Incidentally, I told you all originals must be in Court. I told you at the outset of the trial.

MR. KIMELMAN: They're in my office.

MR. IANNUZZI: When you indicated before that I wanted him to do the investigation, I'm asking for the originals which you already ordered to be turned over.

THE COURT: You started to tell me what Suffolk County didn't give you.

MR. IANNUZZI: Including in this term.

THE COURT: Whatever Suffolk County gave, I directed to be turned over.

You asked for material that Suffolk County didn't turn over.

MR. IANNUZZI: This was part of it, he only turned over typewritten copies.

(The following occurred in open Court.)

THE COURT: In think we're ready, Mr. Cohn.

We will collect the transcripts from the jurors unless you want to use them, Mr. Cohn.

Do you want to use them --

MR. COHN: I am going to make reference, probably to a couple of portions, sometime during the morning, your Honor.

THE COURT: Do you want the jurors to hold the books?

MR. COHN: No.

THE COURT: Do you, Mr. Iannuzzi?

MR. IANNUZZI: No, it's not necessary.

THE COURT: Collect them.

MR. COHN: If there is anything I will refer to, it will be one or two segments which I will read out loud.

THE COURT: Very well.

(Transcripts collected from the Jury.)

THE COURT: We are ready now.

MR. COHN: Might I proceed, your Honor?

THE COURT: Yes, please.

CROSS-EXAMINATION

BY MR. COHN:

Q Mr. McGhee, you gave us your address yesterday. What is it?

A 31 Ontario Street, Huntington, Long Island.

Q For how long a period of time haveyou lived there?

A About eight years, approximately.

Q Where did you live before that?

A 75 Rockland Avenue, North Babylon.

Q How long did you live there?

A About 10.

Q I believe you stated to the Jury that your business was that of a trucker; is that correct?

A Yes.

Q Have you always been in that business?

A Yes.

Q Have you always been self-employed?

A No, I haven't.

Q When were you employed by somebody other than yourself?

A I was employed by Fruit Haulers in -- correction on that.

I was employed by Michael's Trucking aroun 1958, then entered Fruit Haulers, then International Freight, the same job that took over the business.

Q All three were the same company?

A Yes.

Q How long were you with that same company?

A Until they went out of business in 19 -- I believe it was '62 or three.

Q '58 to '62 or three?

Q Yes.

Q So that would be four or five years?

A Yes.

Q Is it then that you became -- went into your own business?

A Yes, they went out of business. I bought my own tractor.

Q Tthe, from time to time, you did -- down

to the present, you have owned various equipment and have been operating as an independent operator under some company names which I think you mentioned here?

A Yes.

Q Is that about the way it was?

A Yes.

:F fls.

(Continued on next page.)

a/2

BY MR. COHN:

Q At the time you started doing business with Gaines, that was, I think you said, May of '74, was the first; that was the International?

A I believe it was in June, sir.

Q May or June of '74?

A Yes.

Q Right.

You were already in the trucking business, though, is that right?

A Yes.

Q This was not your first venture?

A No, it wasn't.

Q Before you started doing business with Gaines -- let's take that point, around the spring of 1974. You say you were actually in the trucking business?

A Yes.

Q Did you have any other equipment besides this one International that you took over to Gaines?

Q Yes.

A You did?

A Yes.

Q What other equipment did you have?

A A Peterbilt, a '73 Brockway.

Q This Peterville --

A Peter --

Q Peterville?

A Peterbilt.

Q What's that?

A A tractor.

Q Where had you gotten that?

A William Cappiello.

Q From Cappiello?

A Yes.

Q But you were operating it?

A Yes, I was.

Q What did you say the other thing was?

A A Brockway.

Q Brockway. What s a Brockway?

A That's a tractor, also.

Q Also a tractor?

A Yes.

Q Did you own other pieces of equipment?

A No more than the International.

Q Just the International?

A Yes.

Q But you actually operated this Peterbilt and this Brockway?

A Yes, with the International.

A The three --

A Right.

Q You did have three pieces of equipment?

A Yes.

Q When you say you got the Peterbilt from Cappiello --

A Yes.

Q Where did you get -- what was the second, Brockway?

A Brockway.

Q Yes, 00

A Bought it from Jergens Trucking.

Q I'm sorry?

A Jergens Trucking.

Q J-e-r-g-e-n-s Trucking?

A Sales, right.

Q Sales --

A Truck sales.

Q Okay. Do you remember what you paid for the Brockway by any chance?

A That truck ran me, interest and all, about $31,000.

Q $31,000?

McGhee-cross-Cohn

THE COURT: Excuse me, when you say you owned these tractors, was there a trailer attached to the tractor or just the tractors?

THE WITNESS: Tractors.

Q Nothing --

THE COURT: Nothing to carry the goods in, just the power part of it?

THE WITNESS: Yes.

Q So, as of the time that you were first introduced to Gaines Service Leasing Company, you had this Internation trailer --

A Tractor.

Q International tractor. You had this Peterbilt which -- '71 Peterbilt which you had gotten from Cappiello?

A Yes.

Q And you had this 1973 Brockway which you had bought for --

A About $31,000.

Q About $31,000 from Jergens Trucking?

A Right.

Q Sales Company?

A Right.

Q Whatever it was. And you were operating

those three pieces of equipment?

A Yes.

Q Is that about right?

A Yes.

Q Now, when you went over to get -- I would like to now go over to the time you went to Gaines for the first time.

You went over to Gaines for the first time -- withdrawn.

At the time you went over to Gaines for the first time, what was your income per month?

A (no response)

Q Or did you have an income? I should ask you that first.

A That's a pretty difficult question to answer, sir.

Q It's difficult?

A Yes, because money varies, depends on the load that you carry.

Q I know. I'm asking you at the time you went over to ask Gaines for this $4,000 on the International, were the loads that you were carrying such that you were making an income or weren't you?

A I'll put it to you this way: As to the

fact that loads pay $800. Some pays $1,000. You have to go back into the books to really find out how much income that was involved.

THE COURT: Can you tell us about how much money you made from the first of the year to the time you came to Gaines in May or June?

Q If you made. I don't know if you did or not.

THE COURT: If you made any money?

THE WITNESS: Made money, but the expenses absorbed all of it, mostly.

Q In other words, even though you had some gross coming in from -- some gross money coming in from some loads, the expenses exceeded the amount that came in and you ended up --

A Not really. They didn't absorb all of it. I still had money left.

Q That's what I think we've been trying to find out. How much did you make, if anything, between, say, January 1st and May or June, 1974?

A I could say roughly about 8,000, $9,000.

Q During that period of time?

A Yes.

Q Net profit?

A Well, I'm not sure about that. I don't have the records with me so I really cannot answer these questions that you're asking me.

Q Let's leave that for a bit.

Let me ask you this: Let me direct your attention to the time you first went down to Gaines or up to Gaines, wherever geographically you went.

You went in there and you were taken in there by Mr. Cappiello?

A Yes.

Q And the purpose you went there was to obtain financing or a loan on your International tractor?

A Yes.

Q And you were looking for $4,000, is that right?

A Yes.

Q And you got it?

A Yes.

Q You met Mr. Schwartz?

A Well, I got $3,500.

Q I understand that. They took out the first month's payment and the month's security?

A Two months.

Q Wasn't one month security?

A One month security, one month payment.

Q Minus the firs month payment and one month security, Mr. Schwartz gave you a check, right?

A Yes.

Q The check was a good check, it cleared the bank?

A Yes.

Q Did you fill out a credit application?

A Yes, I did.

Q About when was that?

A The exact date I can't tell you but I know it was in June.

Q I see. Mr. McGhee, of course, you know, you're testifying under oath in this court?

A Yes.

Q Before you took the stand in this case; namely last fall, the fall of 1975, you testified before the Grand Jury in connection with the charges that were brought against Mr. Schwartz; do you recall that?

A Yes, I do.

Q Do you recall that you were under oath at that time?

A Yes.

Q You also gave some statements to the

authorities before you testified, before the Grand Jury. In other words, going back to the summer and spring of 1975, did you not?

A I believe so.

Q The authorities asked youto swear in front of a Notary Public to the truth of what you said in those statements, didn't they?

A Swear in front of a Notary Public?

Q Were you asked to swear the statements that you gave to the authorities were the truth?

A Yes.

Q And they were the truth?

A Yes.

Q And your Grand Jury testimony was the truth?

A Yes.

Q And what you told these ladies and gentlemen was the truth?

A Yes.

Q When you go to somebody and borrow money or deal in business and are required to fill out forms which require a certification, a statement by you that the statements you make on those forms are the truth and you sign your name, you told the truth in those forms just as

well?

A Yes.

MR. COHN: Might I have this marked for identification, please.

THE CLERK: Document marked Defendant Exhibit J for identification.

xxx (So marked)

Q By the way, Mr. McGhee, one little matter I want to clear up. In going over the documents -- you correct me if I'm wrong -- in going over some of the documents in this case I seem to find half the time you spell your name M-c-G-h-e-e and about the other half of the time you spell it M-c-G-e-e.

A It could be spelled two ways.

(Continued on next page.)

2AM R2

Q Which is your name?

A It doesn't mean nothing.

Q Which?

A Excuse me?

Q Whichever way you want to take it? You just sort of, when you sign something youmake up just -- decide on the spur of the moment which way you're going to spell it?

A No, I signed it Fred McGhee.

Q How do you spell McGhee?

A M-c-G-h-e-e or M-c-G-e-e.

Q How do you decide?

A Excuse me?

Q Is there any particular standard you use to decide --

A No.

Q Whether you're going to put the initial or not?

A No.

Q Nothing that you're afraid of, credit checks?

A No.

Q What?

A No.

Q Your actual name is M-c-G-h-e-e; isn't it?

A Yes.

Q You signed credit applications under M-c-G-e-e

because you didn't want your credit checked?

MR. KIMELMAN: Your Honor, it's been asked and answered.

THE COURT: Overruled. I'll allow it.

A I would like to make a statement --

THE COURT: No, did you do it for that reason?

THE WITNESS: No.

Q When you signed the credit applications for Gaines, you knew that was a paper that you were signing in order to get money from Gaines, didn't you?

A Yes.

Q And did you know that you were being asked to sign to the truth of the statements you made on that application?

A Yes.

Q And that this was going to be considered in connection with the making of the loan to you?

A Yes.

Q Is that a copy of the credit application that you filled out for Gaines (handing to witness)?

MR. KIMELMAN: Might I see it, your Honor?

MR. COHN: Yes, it's been offered in evidence.

(Mr. Kimelman approaches witness.)

MR. KIMELMAN: Your Honor, the original is already in evidence.

THE COURT: It's all right.

Q Is that a copy of the credit application --

THE COURT: The original, for the record, the original is Exhibit No. what?

MR. COHN: It's in the credit file introduced in evidence yesterday afternoon, your Honor.

THE CLERK: 23F.

THE COURT: Was it separately marked?

THE CLERK: 23F.

MR. KIMELMAN: No, it was not marked separately.

MR. COHN: Did not separately offer it yesterday. I now separately offer it in evidence.

THE COURT: Any objection?

MR. KIMELMAN: No objection.

Q Is that it, Mr. McGhee?

THE COURT: Let it be marked.

A Yes.

Q You see on the bottom, "Undersigned warrants --"

THE COURT: Mr. Cohn --

MR. COHN: I'm sorry, Judge Mishler.

THE CLERK: Defendant's Exhibit J, previously marked for identification, is now marked in evidence.

(So marked.)

Q You see down on the bottom, "Undersigned warrants

the truth and accuracy of foregoing information"?

A Yes.

Q A signature?

A Yes.

Q Fred McGhee?

A Yes.

Q M-c-G-h-e-e?

A Yes.

Q And you were warranting the truth and accuracy of this information contained in this application; is that right?

A Yes.

Q Can you look at that application and tell the jury how many untruths are contained in it?

MR. KIMELMAN: Objection.

THE COURT: Sustained as to form.

MR. COHN: Let me rephrase it.

Your Honor, I'm wondering if I can get that original? I could leave a copy in front --

THE COURT: Do you have the original?

MR. KIMELMAN: (Indicating)

MR. COHN: Thank you.

Q Mr. McGhee, let me put that in front of you if I may (handing exhibit to witness).

You know that one of the things credit companies or one of the things leasing companies check are the number of years you've resided in a residence?

MR. KIMELMAN: I object to the form of the question, again, your Honor.

THE COURT: Sustained as to form.

Do you understand that Gaines was relying on the answer to the question, "How long have you resided at the residence" in order to grant you this loan? Did you understand that?

THE WITNESS: Would you repeat that, sir?

MR. COHN: Mr. Silverman, I can't remember what I said.

Let me see the application. Maybe I'll rephrase it.

(Pause.)

THE COURT: Do you see this question where you say you lived at 407 Park Avenue, Brooklyn, Kings, New York?

THE WITNESS: Yes.

THE COURT: Lived there fifteen years?

THE WITNESS: Yes.

THE COURT: Do you understand that in order to make this loan, Gaines Service Leasing Corporation was

relying on that answer to that question?

THE WITNESS: I understood that this application that I filled out at the present time didn't really mean anything.

THE COURT: You didn't think it meant anything?

THE WITNESS: It didn't.

THE COURT: Go ahead.

Q Mr. McGhee, when it said at the bottom of the application, "Undersigned warrants the truth and accuracy of foregoing information," and you had to sign your signature, you said that didn't mean anything so you felt free not to tell the truth; is that what you want us to believe?

A Would you repeat that, sir?

THE COURT: Mr. Silverman?

MR. KIMELMAN: I'll object.

THE COURT: Let me hear it again.

(Last question read by Reporter.)

THE COURT: Objection sustained. I think there are two questions.

MR. COHN: I think there are two, Judge.

Q Did you feel free to put inaccurate information in this application blank despite your certification as to its truthfulness because you felt it didn't mean anything?

A No.

Q Well, you hadn't lived at 407 Park Avenue for fifteen years, ever, had you?

A 407 Park Place (sic), I did.

Q How long did you live there?

A Roughly it was about fifteen years.

Q Didn't you tell the jury before that it was eight years?

A Not at Park Avenue, sir.

Q Well --

A I said --

Q There was an intervening address?

A Excuse me?

Q You mean the thing we asked you about, 407 Park was not the address directly before the one you lived at?

A True.

Q I see. The one you told about this morning where you lived eight years --

A Yes --

Q -- was in between Park Avenue and where you live now?

A Yes.

Q The question says, "previous home address" and you answered "407 Park Avenue, Brooklyn," and that you lived there for fifteen years. Are you now telling us that your

previous home address was not 407 Park Avenue, Brooklyn, where you lived for fifteen years, but was some other place?

A Previous address where I lived before I moved to Huntington, Long Island was 407 Park Place, in Brooklyn (sic).

Q Did you live at any place between 407 Park Avenue, Brooklyn and 31 Ontario St.?

A 75 Rockland Avenue, North Babylon.

Q Do you indicate that any place on this application?

A No, it's not.

Q When you're asked to give your previous home address, you give 407 Park Avenue; is that correct?

A Yes.

Q The fact of the matter, your previous address was not 407 Park?

A Well, I didn't really figure -- did not figure -- I didn't really think that -- about two months at 75 Rockland Avenue. There was not enough time.

Q What you're saying, you were living for eight years at the place you resided at your present address, not two months?

MR. KIMELMAN: Objection.

THE COURT: Overruled. I'll allow it.

Is that true, that you lived in North Babylon

for eight years?

THE WITNESS: I bought the house there.

THE COURT: Oh, but you lived at 31 --

THE WITNESS: Ontario St.

THE COURT: Ontario St.

Q Mr. McGhee, by the way, you had trouble with the payments on these houses, didn't you?

A Trouble?

Q Trouble making payments.

A Yes, everybody has trouble.

Q Everybody has trouble?

A Sure.

Q I see. That's the reason you phonied up these addresses; isn't that right, sir?

A These are the addresses that I lived at at one time.

Q Mr. McGhee, didn't you tell this jury yesterday and -- withdrawn.

Didn't you tell this jury this morning -- I forgot about yesterday -- didn't you tell this jury this morning that you lived where you now live at 31 Ontario St. for five years? That you had lived at a previous address which you gave to the jury for eight years and that previous address was no 407 Park Avenue, Brooklyn?

A Yes.

BY MR. COHN:

Q What was that previous address?

A Before I went to 31 Ontario Street or when I made the loan or --

Q Yes. Before you went to 31 Ontario Street, what was your previous address? Where did you live?

A I lived at 75 Rockland Avenue, for about two months. I bought the house there eight years ago. I lived -- I moved from Brooklyn, 407 Park Avenue, and I lived there for about 15 years.

I moved to North Babylon, bought a house there, stayed -- the house there for about eight years. I stayed there for two months. I moved to Huntington. Stayed there for five years.

Q Mr. McGhee, when you omitted the intermediate address on your credit application, it was because there was a credit record of your having had trouble making payments, wasn't it?

A No.

Q It wasn't? You just didn't think this was a particularly important area for a company making you a loan?

A I wasn't living at the address so why should I put it down?

Q Because it asked you for your previous address.

A And I stated my previous address was 407 Park Place, Brooklyn.

Q Which wasn't your previous address.

A For two months. You want me to put down North Babylon?

Q Well, did it occur to you the company would have wanted you to put down a house which, when checked, would show you had had trouble making finance payments?

Wouldn't you think that would have been of some interest to them?

A Not really, because this application here that I filled out with Gaines Leasing was not check at all.

I received a check immediately after this was presented.

Q In other words, if you feel something you say or swear to isn't going to be checked, you don't care too much about the accuracy of the statement; is that what you want to tell us?

MR. KIMELMAN: Your Honor, I object.

THE COURT: Objection sustained. It is argumentative.

Q All right. Let's move on.

They ask you down a few lines: Other installment obligations, and your answer is: None.

Is that a true answer?

A No, it is not.

Q It is a false answer, sir, isn't it?

A Yes.

Q And in fact, you had other installment obligations and you were in default on them, giving out bounced checks all over Long Island, and you didn't want Gaines to know that, and that's why you lied in that anser; isn't that so, Mr. McGhee?

A No.

Q It isn't?

Let's see. Did you ever heard of a company called Associated Discounts?

A Yes, I have.

Q You told this Jury about the Brockway trailer a few moments ago.

Isn't it a fact that you took that Brockway trailer in the fall of 1973 to Associated Discounts and borrowed money from Associate Discounts on that trailer on an installment basis?

A No, I did not.

Q You didn't? When did you?

A Jergens Trucking Sales made the agreement with Associated Discounts and I went into an agreement with Jergens Truck and Associated Discount took it over.

I did not go to them for a loan, or to purchase any vehicle.

Q Mr. McGhee, I don't want to fence with words.

The fact of the matter is you --

MR. KIMELMAN: Your Honor, I object to Mr. Cohn --

THE COURT: Strike out, "I don't want to fence."

Q Mr. McGhee, did you finance the 1973 $31,000 Brockway through Associated Discounts?

A No.

Q You didn't? Associated Discounts had nothing to do with the Brockway?

A May I explain this to you or you just want me to answer your question?

Q Let me ask you some questions.

THE COURT: I think the question is: Did Associated Discount have something to do with the Brockway?

THE WITNESS: Yes, they did.

THE COURT: All right.

BY MR. COHN:

Q Did you on the 25th day of September, 1973, did you, Fred McGhee, in this case, Fred M-c G-h -- G-h-e-e, sign an installment contract for the purchase of this Brockway trailer?

A I really can't answer that because I don't remember.

Q It is hard for you to remember?

A Yes, it is. Very difficult for me to remember.

Q Have you signed that many $41,000 contracts?

MR. KIMELMAN: Your Honor, I'll object.

THE COURT: Overruled. I will allow it.

MR. COHN: May I have this marked for identification?

THE COURT: Have you signed any other $41,000 contract?

THE COURT: No.

Q Butyou don't remember this?

THE CLERK: Document marked Defendants' Exhibit K for Identification.

(So marked.)

BY MR. COHN:

Q Whose signature is this, sir?

A That's mine.

Q And who is Dolores Jarvis?

A My common-law-wife.

Q That is the lady whose name you gave us as Dolores Thompson?

A Yes.

Q Her name is Dolores Jarvis Thompson?

A Yes.

Q And is BFG Enterprises, Inc., actually Mr. McGhee and Dolores Jarvis Thompson Enterprises?

A Yes.

Q Was that Dolores' signature under yours?

A Yes.

Q Was that signed on September 25, 1973?

A Yes.

Q Is it an installment contract concerning this Brockway?

A Yes. May I see that again, sir?

Q You sure may.

Was this installment contract in effect when you swore on your application to Gaines that you had no installments?

A Was it in effect?

Q Yes.

A With -- yes, it was.

MR. COHN: I offer it in evidence, your Honor.

THE COURT: Any objection?

MR. KIMELMAN: No objection.

THE COURT: Let it be marked.

THE CLERK: Defendants' Exhibit K previously marked for identification is now marked in evidence.

(So marked.)

MR. COHN: Your Honor, may I pass the installment contract in evidence and the least application in evidence to the members of the Jury?

THE COURT: Give it to the foreman and please pass it to the Jury member on your left.

(Exhibits handed to jurors.)

MR. COHN: Excuse me one moment, your Honor.

THE COURT: Surely.

BY MR. COHN:

Q Mr. McGhee --

MR. COHN: Should I go ahead while the jury is looking?

THE COURT: Surely.

MR. COHN: Thank you, sir.

BY MR.COHN:

Q Mr. McGhee, did you have any other installment obligations at the timeyou filled out this application?

A Under DFG Enterprises, not personally.

Q Was there anyone involved in DFG Enterprises except you and Dolores?

A No.

Q On the application, you list your business, your business address as DFG Enterprises, business phone 271-2318, don't you?

A Yes.

Q All right.

Now, my question pertains to you, McGhee, M-c G-h-e-e, Dolores Jarvis, Dolors Thompson, DFG Enterprises; did you have any other installment contracts?

A Yes.

Q How many?

A One.

Q With whom?

A GMAC.

Q And how much -- could I have the GMAC -- and how much was involved in that?

A You want the total figure or just balances or what would you like?

Q I'd like the truth, the accurate figure.

A The car cost $8,000, I believe. A little better than $8,000.

Q Were you in default on the payments?

A I think I was a month behind.

Q Was that a Cadillac car?

A Yes, it was.

Q 1973 Cadillac?

A Yes, it was.

Q You were three months behind, weren't you, sir?

A I believe it was one. I'm not sure.

Q And you didn't list that on this application?

A No, I didn't.

Q You didn't list one word which could have enabled Gaines to find out the truth about your credit, did you?

A He was asking me --

MR. KIMELMAN: I object.

THE COURT: Sustained as to form.

Strike out the answer. The Jury disregard it. It is argumentative.

MR. KIMELMAN: I was looking for that.

MR. COHN: You want a copy of my notes? I will be glad to give them to you.

MR. KIMELMAN: No, I don't think so. I just want to see that exhibit.

MR. COHN: This isn't the exhibit.

MR. KIMELMAN: This is.

MR. COHN: Surely.

F fl.s

(Continued on next page.)

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BY MR. COHN:

Q Any other installment obligations? Anything to do with your house or houses?

A Not to my knowledge, at the present time. I have a house in North Babylon.

Q Yes. Any financing on that?

A Yes.

Q Were --

THE COURT: You are talking about as of the date of the application?

MR. COHN: Yes.

A Yes.

Q And did the financing of the house in North Babylon call for monthly payments?

A Yes, it did.

Q Did you list that on this application?

A No, I didn't.

Q As a matter of fact, it was this North Babylon address that you did not list as your previous address on this application isn't it?

A That's correct.

Q That's the same address, is it?

A That's correct.

Q All right. The Brockway trailer, GMAC, the

house, were there any other installment obligations besides those three, which you omitted from this application?

A Not that I can recall.

Q Could have been but you don't recall now?

A No, I don't.

Q Wouldn't bother you particularly anyway, would it?

MR. KIMELMAN: Your Honor, objection again.

THE COURT: Objection sustained.

Q Now, I want to get back to this Brockway piece of equipment that was bought from Jergens. There came a time when you executed installment coupons in favor of the Associated Discounts, calling upon you to make monthly payments for that Brockway, did there not?

A Yes.

Q And you, Mr. McGhee, you, Fred McGhee, signed those coupons which called for payments of how much?

A Cannot remember, sir.

Q Pardon me?

A I cannot remember.

Q Well, if I suggest the figure of $820 a month, would that ring a bell?

A Sounds pretty close.

Q If I showed you some of the bounced checks

you gave them, would that refresh your recollection?

A Maybe it would.

THE CLERK: Two documents marked Defendant's Exhibits L and M for identification.

(So marked)

Q I show you Defendant's Exhibit L for identification and ask you, first of all, looking at this document, does it refresh your recollection as to how much you agreed to pay Associated Discounts per month?

A $861.50.

Q $86.50?

A Yes.

Q And how many checks did you bounce on Associated Discounts in connection with this equipment? Is this the only one?

A To my knowledge.

Q I see. Is this a photostatic copy of a check you gave them?

A Yes.

Q Which was returned for insufficient funds?

A Yes, it is.

MR. COHN: I offer this, your Honor.

THE COURT: Any objection?

MR. KIMELMAN: Yes, your Honor. I object.

THE COURT: You want to argue this?

MR. KIMELMAN: Yes, I do.

THE COURT: The jury may be excused.

JUROR NO. 10: Shall we take this with us or leave it here?

THE COURT: No. They will be returned to the courtroom.

(The following occurred in the absence of the jury.)

MR. COHN: I would appreciate the witness --

THE COURT: Would you take the witness outside the courtroom doors. We'll call you in after we complete the argument.

THE WITNESS: Sure.

MR. COHN: I'll ask you to read back the last question and answer. Not now, but when the jury comes back.

THE COURT: I don't need the last question.

MR. COHN: No?

THE COURT: I think it's the whole line of examination. Frankly it cuts two ways. The Government urges that they can prove that the rate of interest, simple interest was 24 per cent a year. I think that if the defendant is allowed

to show the poor risk then I should say that the victim is allowed to show that that's why he came to Gaines and that's why he's ready to pay 24 per cent.

MR. COHN: Your Honor, I think you'll see when the line of examination --

THE COURT: There is only one basis, I can see of, for allowing this. And that is that to try to explain the extreme statements and language that the defendant used when he addressed McGhee, if he was ultimately led to believe that he was defrauded by the victim.

MR. COHN: Yes, your Honor. All those reasons are so and there is another reason, which I would be very happy, if this is appropriate to tell the Court outside the presence of Mr. Kimelman.

THE COURT: No. I wouldn't do that.

MR. COHN: Because --

THE COURT: I am inclined to allow it.

MR. KIMELMAN: May I make my -- could I make my argument, Judge?

THE COURT: Yes.

MR. KIMELMAN: My argument is this: The witness when asked by Mr. Cohn immediately responded,

"Yes, there were other obligations that I did not put on the application." There is no inconsistent statement. There is no --

THE COURT: You are arguing about the form rather than --

MR. KIMELMAN: No. I am arguing --

THE COURT: The entire area? I am wondering when all this evidence came in, as to why proof of the repeated failure of the victim to pay his obligations, his defaults come in at all? It is really outside the issues of the case, as I see the issues.

MR. COHN: Judge Mishler, I have great respect for your legal judgment on anything but I think this is about the narrowest restriction on a credibility examination I ever heard.

THE COURT: I am not restricting it. I am allowing it.

MR. COHN: There is another reason.

THE COURT: I am allowing it with tongue in cheek because --

MR. COHN: Let me -- let your Honor rest more easily on this. If I go ahead without a recess for Mr. Kimelman, I'm sure he would assure

me he would not talk to the witness.

THE COURT: No. You'll go on without a recess. I'll bring them back.

MR. COHN: There is an added and much more important reason. I'll bring up a series of relationships between Associated Discounts and this witness. I'll then show that this witness had this Brockway repossessed by Associated Discounts, that the man who repossessed it was Grove Ebbert, that this witness had a long relationship with Grove Ebbert, that when this witness made certain statements to this jury and to the Grand Jury concerning his relationship or lack of relationship or knowledge of Grove Ebbert, it was for the purpose of concealing exactly what that relationship was and how it bore upon this case.

MR. KIMELMAN: Your Honor, I think it is improper for Mr. Cohn to go about it this way. He can ask the witness, did you know --

THE COURT: No.

MR. KIMELMAN: "Did you know Grove Ebbert?"

THE COURT: Wait. I still don't understand how that -- let's assume that he -- he didn't lie on the witness stand about -- or maybe he did.

MR. COHN: Yes, he did.

THE COURT: He said he didn't know Grove Ebbert. All right. I'll allow it for that reason. That sounds like a pretty good reason. But, on the other hand, I am firmer in my basis, as I see it, for allowing the Government to show that the rate of interest is 24 per cent.

MR. COHN: Judge, why --

THE COURT: What's the relationship?

MR. COHN: With great respect again, Judge, why is it every time a major, key Government witness in this case, on a clear cut issue of credibility, when I offer something which I think under any standard in the world goes directly to the man's credibility in this case and his statements: I'm -- the honest man who was up to date in my -- the Grand Jury testimony, all my obligations till December 2nd, 1975, when I ran into some bad times and so I wouldn't embarrass a creditor, I immediately made arrangements to transfer property over to Mr. Mignoli so he could assume payments.

If I cannot show that that man has consistently lied to the Grand Jury, to the authorities when

he gave signed statements, to this jury, on the credit application to Gaines, why do I have to be penalized by saying that opens the door to --

THE COURT: No, it doesn't open the door. I already had felt that they were entitled to it. I'm -- I feel I'm -- I'm on firmer ground. But, for example, I've allowed you to go pretty far, mind you. The application says, previous address. It does not say, last previous address. I think that's in the picking, but --

(Continued on next page.)

JK
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MR. IANNUZZI: I agree with you.

THE COURT: There was no objection.

MR. COHN: Mr. Iannuzzi agrees with you. I don't.

I think you have -- what looks like a very intelligent jury here. They can make up their own minds.

THE COURT: I rely on the jury, I agree.

MR. COHN: So do I. After three experiences involving myself, I have nothing but wonderful reliance on jurors.

THE COURT: I feel the same way.

All right, seat the jury.

Bring the witness in.

MR. IANNUZZI: May I ask Mr. Kimelman if he has them to give us the signed or Xeroxed copies?

THE COURT: It's here, I assume.

MR. KIMELMAN: I have them.

THE COURT: Turn it over, please. Let's mark it first and then turn it over.

MR. KIMELMAN: Very good. Your Honor --

THE COURT: Suppose you seat the jury. Bring the witness in.

Do the marking while the examination is on. We'll save about twenty seconds.

THE CLERK: Fine. Okay.

MR. KIMELMAN: Your Honor, I will, in order not to interrupt, I'll have a standing objection as to the physical introduction of exhibits that relate to Fred McGhee's dealings with other credit companies.

THE COURT: No. I say the only basis I can find for it is an explanation of the language and the vehement tone of language, because --

MR. KIMELMAN: Your Honor, there is no --

THE COURT: It may very well be that the defendant could argue, now look, he used this language when he realized he was taken. He looked at the application. It was a fraud on him and it wasn't a threat of violence, but a reaction in exasperation.

There is a further ground that Mr. Cohn pointed out and that was that he wanted to show that this witness in fact did know Grove Ebbert. I do not know which name is the last name, the surname.

MR. COHN: Ebbert, you have it right.

MR. KIMELMAN: Your Honor, if Mr. Cohn can show us on this piece of paper how it shows that he knew Grove Ebbert, then I'm willing to withdraw my objection.

THE COURT: I say I think your argument is technically correct, that the mere fact that he wants to face this witness with some showing that he knew

Grove Ebbert and that he didn't meet him for the first time when he came to the house, it is not necessary to introduce all this material; but I can see another reason for it.

I will allow it.

I give defense counsel, as you know, wide latitude in cross-examination.

MR. KIMELMAN: All right. Your Honor, I also would like to respectfully counter your Honor's argument that this would be a basis whereby you could explain Schwartz' actions on the tape.

There is no evidence at this point that Schwartz knew about any of this.

THE COURT: No, but I will let him develop it.

MR. KIMELMAN: What happens if we get to a point later on where it is never developed?

THE COURT: Mr. Kimelman, it is in Schwartz' file. I think a lawyer can always argue that he relied on it.

MR. KIMELMAN: Your Honor --

THE COURT: Look --

MR. KIMELMAN: I beg to differ.

MR. COHN: I represent to the Court it will be developed.

THE COURT: Even if it isn't --

MR. COHN: It's going to be, of course.

THE COURT: When evidence comes in, it is to allow both sides to argue, from both points of view.

I can see where Mr. -- Mr. McGhee practically gave the answer to this. He said rely on this application? Nonsense. He gave me the check immediately.

MR. KIMELMAN: I understand, your Honor. But there is no evidence that this even came from Mr. Schwartz' file. This is gotten by a subpoena.

THE COURT: It is on Gaines Service. Look, we can draw the fair inference that this was a Gaines application.

MR. KIMELMAN: No. I am talking about the accounts with Associated Discount. The evidence that he wishes to be offered now as to his dealings with Associated Discounts. There is no evidence that Schwartz knew -- or ever knew --

THE COURT: I will allow it subject to connection, just like the Government offers matters subject to connection. I will allow the defendant to do the same.

MR. KIMELMAN: Very good, your Honor.

THE CLERK: One-page statement dated 4/24/75.

marked Government's Exhibit 3500-8.

(So marked.)

THE CLERK: A four-page statement dated 4/23/75 marked Government's Exhibit 3500-9.

(So marked.)

MR. KIMELMAN: Your Honor, I would ask Mr. Iannuzzi, after he compares these with the originals, with the copies that the Government has furnished him, would he return them because they are the only copies.

THE COURT: It is not going to be in his custody. I want him to look at it since he can conduct the cross-examination. It will be in your custody, Mr. Kimelman. You are responsible to Suffolk County for it.

He wants to look at it now before he cross-examines. That is all.

MR. KIMELMAN: We don't have to return these to Suffolk County. These were copies of the original statements that Suffolk County gave to us.

THE COURT: They still come from your file.

MR. KIMELMAN: That's correct.

MR. IANNUZZI: Just to clarify the record, these are not copies. These are originals, signed originals.

THE COURT: Mr. Kimelman thinks they are Xeroxed copies. Sometimes I have trouble.

MR. COHN: What's the difference?

THE COURT: There is a theory that you might be able to somehow alter Xerox copies. But Mr. Iannuzzi is a very careful practitioner.

MR. KIMELMAN: I am informed they're carbon copies.

THE COURT: Carbon copies.

MR. COHN: Your Honor is receiving Exhibit L?

THE COURT: Yes.

THE CLERK: Defendant's Exhibit L previously marked for identification is now marked in evidence.

(So marked.)

THE COURT: Seat the jury.

(Jury present.)

MR. COHN: We need the witness.

THE COURT: I asked the witness to leave the room while we argued.

MR. COHN: Right.

MR. KIMELMAN: I'll get him.

THE COURT: As soon as he gets back, we will proceed.

MR. COHN: May I pass to the jury the exhibit which your Honor has received in evidence?

THE COURT: Give it to the Foreman.

I see jurors No. 9 and 10 have the other exhibit.

MR. COHN: It's L and M.

THE CLERK: Defendant's Exhibit M previously marked for identification is now marked in evidence.

(So marked.)

MR. COHN: May I have the last question? My last question and Mr. McGhee's last answer before the jury was excused?

(Record read.)

(continued next page)

BY MR. COHN:

ss/ss 4aml

Q I believe I had asked or started asking was this the only check which was returned for insufficient funds?

A As far as my knowledge.

Q Does this refresh your recollection that there were more than one that bounced (handing to witness)?

A Well, this is not a bounced check, sir.

Q It's not?

A No, it's not. It's lack of signature.

Q Lack of signature?

A If you notice.

Q Did you make good the funds?

A My wife did, I believe it was. I'm not sure.

Q Would you check that for us during the recess and tell us about it?

A It would be highly impossible, sir, no one is home.

Q It would be impossible to check it for us?

A No, I can check it, but not today.

Q Well, anyway, you defaulted month after month to Associated Discount on the installment of payments for this Brockway, did you not, sir?

A I can't answer that because it goes into the

question --

Q Was what?

A I can't answer that because it involves a great deal with the Associated.

Q You have a lot of problems with Associated, too?

A Yes, not financial problems, but problems with the equipment.

Q With the equipment?

A Yes.

Q Is that why you didn't pay them?

A No, it was in debate with them because there were two vehicles involved at the time.

Q You were sort of debating with them, called you up, "Why are you not paying? Why are your checks not good?" You would say "The equipment is not running properly;" is that right?

A No.

Q What is right?

A As to the fact that one equipment that you have on your list paid for and they never reduced the payments. The payments on that '73 Brockway is only 400 some-odd dollars and when the other vehicle was paid out they never reduced it.

Q When did that happen?

A I have to check the records for you, sir.

Q What's your recollection as you sit on the witness stand now?

A I really can't remember. It's 1973.

Q I'm sorry. You said you can't check the records or you can check the records?

A I can check the records for you, but I can't check them now.

Q You have a lot of phone calls from Associated Discount, didn't you?

A Yes, I did.

Q Complaining because you weren't making payments?

A Yes, I did.

Q And, as a matter of fact, in January of 1975 Associated Discount said to you "We give up," and came over and repossessed the Brockway, didn't they?

A They didn't repossess the Brockway. I gave it to them.

Q You gave it back?

A Yes, I did.

Q When?

A I can't remember the exact date, sir. It was during 1975, I believe.

Q Did they call you and tell you that they had a repossession notice out on it and that you were to turn it in;

that you were months behind in payments? Did they tell you that?

A Associated never called me and told me that they had a repossess out. I was dealing directly there with Jergens' Truck Leasing which made up that agreement with Associated.

Q So your dealings were with Jergens rather than Associated?

A Yes.

Q I understand.

As a matter of fact, you received notices of sale, proposed sale of the Brockway equipment from Associated, didn't you?

A After it was returned to them, yes.

Q I want to turn to something else for a minute.

When you testified before this jury yesterday afternoon, you were telling them about the two men who approached you in April of 1975, do you recall that?

A April 21, I believe.

Q April 22 as well?

A Yes.

Q And you described one, who you identified as George; is that right?

A Yes.

Q As for the other you said, you described him as a white male; is that correct?

A Yes.

Q And you were asked whether the white male introduced himself to you and you said he didn't introduce himself to you?

A Yes.

Q That white male was Grove Ebbert, wasn't he?

A I found out later that he was, yes.

Q You found out later?

A Yes.

Q Isn't Grove Ebbert the same Grove Ebbert who telephoned you many times, not for Mr. Schwartz, but on behalf of the Associated Discount to tell you that you were not making the payments on your truck?

A That's how I knew who he was.

Q That's how you knew?

A Yes.

Q So the white male was Grove Ebbert?

A Yes.

Q And the same Grove Ebbert whom you had spoken to how many times on the telephone?

A I really can't answer that. I don't know.

Q Give us your best estimate?

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A Maybe three or four times.

Q What were the conversations?

A He was asking me when could I make the payment, could I send the payment in. I preferred Jergens' Trucking --

Q Did you know Grove Ebbert was calling on behalf of Associated Discount?

A Yes, I did.

Q There were no secrets, he said "This is Grove Ebbert, Associated Discounts"?

A Yes.

Q Gave you his name?

A Yes.

Q As a matter of fact, when you talked to him on these events in April, you recognized his voice, didn't you?

A Yes.

Q Knew it was the one and the same Grove Ebbert?

A Yes.

Q You recall testifying before the grand jury in this case, I believe, you told us that already and that date was November 3, 1975. Does that sound about right to you?

A I believe so. I'm not sure.

Q You knew that that grand jury was considering Mr. Kimelman's presentation of evidence concerning Jack Schwartz, didn't you?

A Yes.

Q And you were called by Mr. Kimelman to testify; is that right?

A Yes.

Q And as we know from grand jury procedure, there was no lawyer like myself or someone else there to cross-examine you, was there?

A No.

Q By the way, were your payments to Gaines up to date until December 2, 1974?

A As far as my knowledge, I believe they were.

Q I see. They were?

A Yes, as far as I know.

Q As a matter of fact, before the grand jury you were asked the following question and you gave the following answer, did you not:

"Question: Now, did there come a time in December or November of 1974 when you started falling behind in your payments to Jack Schwartz and Gaines?

"Answer: I think the payment was due December 2nd. It was up to date until December 2nd."

Were you asked that question and did you give that answer?

A Yes.

Q Was it true?

A As far as my knowledge it was up to date. I didn't send them any checks. I didn't make out checks to them. My wife did that.

Q I see.

In other words, if there were trouble with checks or payments not made or bounced checks, you're telling us -- is it a fact it was your wife who took care of these things?

A Yes.

Q So when you told the grand jury that as of December 2, 1974, you were current in your account with Gaines, if you are mistaken, if they got bad checks or wherever it was, you could have been mistaken, but the reason you could have been mistaken was because it was your wife, so on; is that it?

A Yes.

Q There's not a word of truth to that answer, is there, Mr. McGhee?

MR. KIMELMAN: Your Honor --

THE COURT: Objection sustained.

THE CLERK: Document marked Defendant's Exhibit N for identification.

(So marked.)

Q Is your wife's name Fred McGhee?

MR. KIMELMAN: Your Honor --

THE COURT: Objection sustained.

Q Will you look at this, please, and tell us - whose name is that?

A That's my signature.,

Q Whose signature is that?

A That's mine, also.

Q What are the dates?

A 11-10-74.

Q November 10, '74?

A Yes.

Q Bounced check (indicating)?

A Yes.

Q Your signature (indicating)?

A Yes.

Q And you had signed that before you testified, long before you had testified before the grand jury that returned the indictment in this case?

A Repeat that question?

Q I'll withdraw that.

At the time you testified before the grand jury and told them you were current as of December 2, 1974, you

knew you had bounced checks on Gaines prior to December 2, 1974, didn't you?

A I also believed those checks were made good. That's why I made the statement to the grand jury because they were sent back to Gaines for those checks.

Q Didn't you tell these ladies and gentlemen within the last five minutes that the reason you could have been mistaken was because your wife signed the checks, not you?

A She made the checks out, sent them out.

Q You didn't look at them before you signed them?

A Why should I?

Q Why should you?

A Yes.

MR. COHN: I offer this, your Honor.

THE COURT: Any objection.

MR. COHN: It's in evidence already, in the credit file. I'm offering it as a separate one. I'm not sure whether I marked it as a separate document when I showed it to Mrs. Montaigne yesterday or not.

THE COURT: Any objection to this, Mr. Kimelman?

MR. KIMELMAN: If I can just examine the original for a moment?

In this case, I'm going to ask the original be put in.

MR. COHN: Fine.

THE COURT: Separately mark the original and it comes out of what?

MR. KIMELMAN: 23.

THE COURT: What's the last letter?

THE CLERK: 23-F.

THE COURT: This would be 23-G. I see there are two documents there.

MR. COHN: I'm offering one.

MR. KIMELMAN: Your Honor, there is an actual check and then a xerox.

THE COURT: You said you wanted just the original marked?

MR. KIMELMAN: When I say the original, your Honor, Mr. Cohn is offering xeroxes of the original files of Gaines.

THE COURT: I see two checks there. I thought he was offering one.

MR. KIMELMAN: I don't know which one he's offering, Judge.

MR. COHN: Mr. Kimelman has anticipated, your Honor.

THE COURT: Mark it G and H.

MR. KIMELMAN: Fine.

THE CLERK: So marked in evidence.

(So marked.)

THE COURT: You can mark your copy that way, Mr. Cohn --

MR. KIMELMAN: Mark this in evidence.

THE COURT: No, it's already marked. It's being further identified.

THE CLERK: 23-G is dated 11-10-74.

23-H in evidence --

MR. COHN: No, for identification.

THE COURT: It's part of the file.

THE CLERK: 23-H in evidence, 11-29-74.

(So marked.)

THE COURT: You haven't examined that exhibit?

MR. KIMELMAN: Should I keep that?

MR. COHN: No.

(Continued next page.)

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MR. COHN: Might I pass this to the Jury?

(Document passed to the Jury.)

BY MR. COHN:

Q At the time that bounced check was issued -- withdrawn.

That was the second vounced check of its kind that had been issued to Gaines, was it not?

A Those checks I think that you're presenting there are for license plates.

They're not for payments, if I can remember correctly.

Q Was the license plate $820?

A YEs, they were.

Q I'm coming to the license plate check in a minute, Mr. McGhee.

The check I'm talking about is not a license plate check.

MR. KIMELMAN: Your Honor, instead of Mr. Cohn testifying --

THE COURT: Strike that statement out. The Jury is to disregard it.

Q Isn't this the license plate check, Mr. McGhee?

(Handing.)

A Yes, it is.

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MR. COHN: Might I show this to the Jury?

THE COURT: Yes.

Q Isn't it a different amount than the bounced check? I didn't notice.

THE COURT: Exhibit 23-G.

Q $722 --

THE COURT: Referring to Exhibit 23-G.

Q 23-G, the bounced check given to Gaines was $722. The license check was $820, which went to the renewal of the license on the equipment, didit not?

A There was an incorrect amount on the check then.

Q There was an incorrect amount of the check?

A Yes, the payment is $609, not $722.

Q How long were you in default?

A I can't answer those questions.

Q You can't?

A I don't remember.

(A document is handed to the Jury by Mr. Cohn.)

Q When it came to paying the license, you made the check good. When it came to paying Gaines, you bounced the check in November; isn't that so, sir?

Q Would you repeat that, sir?

MR. COHN: Might the reporter read it?

THE COURT: Mr. Silverman.

(Record read.)

A I really can't recall if the check boun ed, which one it was.

Q Mr. McGhee, as a matter of fact --

THE COURT: When Mr. Cohn said, "And you bounced the check," I think what he meant is that you did not make that good subsequently; isn't that right?

MR. COHN: Yes.

THE COURT: Isn't that true, you didn't make it good after it returned for insufficient funds?

THE WITNESS: Well, like I told him before that I think the checks were made good. I'm not sure.

THE COURT: You're best recollection is that the check that Mr. Cohn described as a bounced check was made good?

THE WITNESS: As far as I know.

THE COURT: Do you recall how, was it by cash or by another check?

THE WITNESS: I think it was by another check. I'm not sure.

BY MR. COHN:

Q As a matter of fact, the bounced check, that was the second time the same check had been presented to the point that the bank said, "Do not present this to us again," didn't it?

A Yes.

Q Mr. McGhee, in your testimony in this case and to these ladies and gentlemen of the Jury, you have been saying everything you possibly could --

MR. KIMELMAN: Your Honor, I object to the form of the question.

THE COURT: Let me hear it.

(Question read.)

Q -- to hurt Jack Schwartz, have you not, sir?

A No, I haven't.

MR. KIMELMAN: I still object.

THE COURT: No, I will allow it. I will have the answer sustained.

Q And the answer is you have not?

A I have not.

Q You just want to be fair, is that it?

A Yes.

THE COURT: Motive in testifying, state of mind of a witness, is always before the Jury and

his attitude, the relationship between the witness and the defendant is always, for the Jury, a question.

BY MR. COHN:

Q You told the ladies and gentlemen of this Jury yesterday -- withdrawn.

I want to refer you to the night of April 21st, when there was a knock on the door and when Dolores answered the door and said you weren't home; do you recall that?

A The --

Q The night of April 21st at approximately 11:30 at night, between 11:30 and 12:00 o'clock at night?

A Yes, but this is a question there, because she didn't answer the door.

Q Okay.

What happened was these two men knocked on the door; is that correct?

A Yes.

Q And your wife called from inside and asked who it was?

A Correct.

Q And they later said you were not at home?

A Yes.

Q The fact is that you were at home?

A Yes, I was.

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Q And being at home, you heard what was said?

A Yes.

Q And did you tell the ladies and gentlemen of this Jury yesterday that the first two words you ever heard uttered in your life by this man you've identified as George, were the words, "Jack Schwartz"?

A Yes.

Q Were you asked the following question and did you give the following answer?

MR. KIMELMAN: Where?

MR. COHN: 368, Line 18.

THE COURT: Before the Jury.

MR. COHN: These, ladies and gentlemen, yesterday afternoon.

THE COURT: What page?

MR. COHN: 368, line 18.

THE COURT: Thank you.

Q "Question: What happened"--

MR. COHN: I'm talking, your Honor, ladies and gentlemen, of the night of April 21st, 1975.

Q "Question: What happened when these individuals came to your house?"

Mr. Kimelman's question, and your answer:

"Answer: They knocked on the door and

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my common-law-wife asked who was it, and it was a Spanish accent came out, says, 'Jack Schwartz.'"

Were you asked that question?

A Yes.

Q And did you give that answer under oath?

A Yes.

MR. KIMELMAN: Your Honor, that's the --

THE COURT: That's the only question and the only answer.

The witness said he gave that answer to that question. That's all.

MR. COHN: Thank you, your Honor.

Q Mr. McGhee, was your memory concerning the events of the night of April 21st, better two days later, on April 23rd, or is your memory better today, April of 1976?

A It was better two days -- it was better then, two days later or a day later.

Q When you made a statement to the authorities on April 23rd, you said that the two men who came to you identified themselves as from Gaines Leasing, and did not identify themselves as Jack Schwartz; isn't that what you told the authorities?

A It's a mistake.

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Q The authorities made a mistake?

A Somebody did.

Q Could it have been you?

A Gaines Leasing was definitely mentioned and he also said he's from Jack Schwartz, Gaines Leasing.

Q Did you tell this Jury yesterday that the two men said, "Gaines Leasing:?

A Yes, I believe I did.

Q Were you asked the following questions --

MR. COHN: I'm starting back with the one I read before and going on, your Honor, with your permission.

Q Were you asked the following and did you give the following answer:

"What happened when these individuals came to your house?

"Answer: They knocked on the door and my common-law-wife asked who was it and it was a Spanish accent, came out, says, 'Jack Schwartz.'

"Question: Were you able to hear this conversation?

"Answer: Yes, I did.

"Question: You were at home?

"Answer: Yes.

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"Question: You heard a voice with a Spanish accent saying 'Jack Schwartz'?

"Answer: Yes.

"Question: Could you tell us the rest of the conversation?

"Answer: My wife asked 'What do you want?'

"He said, 'I want to see Fred McGhee.'

"She said, 'He is not at home.'

"They said, 'He must be at home.'"

Were you asked those questions and did you give those answers?

A Yes.

Q Two days after this incident took place, on April 23, 1975, do you recall being with a detective of the Suffolk County Police Department named Joseph Mequia?

A I believe so.

Q Did you make a statement to him?

A I made so many statements, I made one that night also.

THE COURT: "That night," meaning what night?

THE WITNESS: The night of the fire.

THE COURT: Mr. Cohn is referring to April 23rd. Did you make a statement to Detective Mequia?

THE WITNESS: What I'm grying --

THE COURT: Or a Suffok County detective on the 23rd?

THE WITNESS: What I was trying to find out, is that before the fire or after the fire?

BY MR. COHN:

Q You made two statements; is that right?

A (No response.)

Q In the period April 23rd and April 24th, you made two separate statements; is that correct?

A I believe so.

Q I'm going to talk to you about both of them. Do you remember Detective Mequia?

A Sir, I was involved in so many detectives, I really can't remember by them.

Q Who was the first detective you signed a statement for on April 23rd or April 24, 1975?

A I can't answer that. I don'tknow his name.

Q How many were you involved with on those two dates, April 23rd and April 24th?

A It seemed like the whole force.

Q Did you sign statements for the whole force?

A No, I didn't. There were so many involved.

Q You signed two statements and two alone,

didn't you?

A Yes, I made two statements.

Q And you swore to them, didn'tyou?

A Yes.

Q And they were the truth?

A Yes.

Q Weren't they?

A Yes.

Q And your memory was much better then than it is --

A Today, yes.

Q All right. And in both of those statements, you stated that the men who arrived identified themselves as from Gaines Leasing and never mentioned the name Jack Schwartz; isn't that so?

THE COURT: Excuse me. I'd have to sustain objection to that.

Read from the statement because --

MR. COHN: Your Honor is right.

THE COURT: -- the question may indicate the statement said it never mentioned Jack Schwartz.

MR. COHN: Right. I'm reading, your Honor.

Do I say 3500-2?

THE COURT: Well --

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MR. COHN: That's its number.

THE COURT: I show you 3500-2; is that you're signature?

I assumed it was a signed statement.

MR. COHN: You're going to have trouble, Judge.

MR. COHN: I'm perfectly willing --

THE COURT: There it is (indicating).

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(Continued on next page.)

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BY MR. COHN:

Q Mr. McGhee, I am going to show you something that we have marked 3500-2. Do you want to see the original with your signature? If you do, I will show you that.

A Yes.

(Document shown to witness.)

THE COURT: Is that your signature, Mr. McGhee?

THE WITNESS: Yes, it is.

THE COURT: The Government represents that 3500-2 is a copy; is that right?

MR. KIMELMAN: That is correct.

MR. COHN: I will accept that representation.

Q Now, working with this copy of the statement that you signed, I believe, it was executed on the 24th day of April, notarized by Detective McQuay and in that statement did you say as follows:

"On April 21st, 1975 at about 12 midnight, two men came to my home and asked to see me. My wife answered the door and told them I wasn't at home. They said they were from Gaines Leasing Co. and they had a yellow Maverick. They told her they would be back Thursday."

Did you sign that statement?

A Yes, I did but they left out the part of --

THE COURT: Did you sign that statement?

THE WITNESS: Yes, I did.

Q Do you swear to the truth of that statement?

A Do you have a signature on that?

MR. COHN: Your Honor, if the witness is going to dispute this statement, despite the Government's --

MR. KIMELMAN: Your Honor, I object to the colloquy.

THE COURT: It is this witness' statement. You are showing him a copy. All the Government said is that they represent the copy is an exact copy of the original. The witness is testifying.

MR. COHN: I asked him if he swore to it and he is telling me that he wants to see the original of the statement, so I guess I had better have it.

MR. KIMELMAN: He has it.

MR. COHN: I do not know if I do.

Q We now have the original statement before us, Mr. McGhee and I ask you if you swore to it? What does it say here?

A Sworn to me before --

Q Say it so the jury can hear it.

MR. KIMELMAN: Can he ask him if it refreshes his recollection?

THE COURT: I will allow him to ask it in his form.

A (Continuing.) -- sworn to me before the 24th day of April, 1975.

Q Does it bear your signature?

A My signature.

Q And the witness of this detective (indicating)?

A Yes.

Q And this statement: "At about 12 midnight two men came to my home and asked to see me. My wife answered the door and told them I wasn't at home. They said they were from Gaines Leasing Co. and they had a yellow Maverick. They told her they would be back Thursday."

You show me where in this paragraph or anywhere there is any account of the events of the night of April 21st where you said that a Spanish voice came out and said "Jack Schwartz"? It is not there, is it, Mr. McGhee?

THE COURT: Is it in that paragraph?

THE WITNESS: No.

THE COURT: The answer is "No."

MR. KIMELMAN: Your Honor, since counsel -

THE COURT: No, Mr. Kimelman. It is Mr. Cohn's examination.

MR. COHN: This is a good recess time. I am almost finished.

THE COURT: We are going to take an early lunch and I'd ask you to return at 1:15. I am giving you five minutes extra. It is only ten after 12:00. Every minute counts. Please get done by 1:15.

Before the jury leaves, I want to say you may come across counsel or the defendants or a witness in the halls and they are directed not to talk with you, not to go down in the same elevator with you. We try to keep the jury away from any possible subtle impression or improper contact with those who are interested. If they do not say hello to you, do not recognize you, they do not mean a discourtesy. They are directed not to recognize you. They may nod saying hello. I would appreciate those remaining in the Courtroom to remain for three or four minutes to give the jury an opportunity to leave the building. Thank you.

(Jury leaves the Courtroom.)

THE COURT: I know you were about to offer the statement, which is improper.

MR. KIMELMAN: I object to counsel reading from a statement not in evidence.

THE COURT: It is perfectly proper. It is 3500 material.

MR. KIMELMAN: Reading it to the jury? He can ask the witness if it refreshes his recollection.

THE COURT: Or if he made the statement.

MR. COHN: That is what I did.

THE COURT: It is perfectly proper.

What puzzles me is why you won't show him the original?

MR. COHN: I prepared the cross-examination from the copy I had and I had the sentence I wanted underlined. The original comes out with different page numbers and I could not find the paragraph that I was looking for in this typed copy.

THE COURT: He is obviously puzzled by it because it was not familiar to him.

MR. COHN: I had to use the original, which I guess is a point for Mr. Iannuzzi. I guess I should work and the Government should work from originals.

THE COURT: I agree with that.

I insist on originals every time. I thought the next question was going to be, and I was about to ask it, do you say it anyplace in the statement? I thought there was a reason why you wouldn't show him

the whole statement.

MR. COHN: No, there is not a word in the whole statement .

THE COURT: Incidentally, if you want that as 3500 material and you want to use it during the lunch hour, I would ask that it be xeroxed and you be given copies.

Do you want a copy also or can you work from one?

MR. IANNUZZI: Since he has the machine, maybe we should have two made?

MR. COHN: I would appreciate 3500-2 -- I don't know what this is (indicating)?

THE COURT: You have 3500-2?

MR. COHN: And I would like 3500-3. I do not have the original, your Honor.

MR. KIMELMAN: Mr. Iannuzzi has it.

THE COURT: Give Martin both originals and he will make copies.

MR. IANNUZZI: These are the only ones that he gave us (indicating).

MR. COHN: You are holding back an original. Here is 3500-3, which is totally different.

MR. KIMELMAN: Show it to me?

7 McGhee

THE COURT: Get that one up in the meantime.

MR. IANNUZZI: Before you go --

MR. COHN: Judge, I am willing to bet that I am right, but maybe I am crazy. There are two different statements and they are not the two Mr. Iannuzzi is showing me.

THE COURT: I won't take either alternative. There is probably an explanation, if you give Mr. Kimelman an opportunity to look at it.

MR. IANNUZZI: Then there is another original.

THE COURT: Is there another original that you have not turned over? Will you try to work it out?

MR. COHN: I would like the original to 3500-3.

THE COURT: All right.

MR. KIMELMAN: If you give me the papers I will have an opportunity to look at them.

(Luncheon recess taken.)

GR:Jk
1pm R1

AFTERNOON SESSION

(The following occurred in the absence of the jury.)

THE COURT: Seat the jury, please.

MR. COHN: Be about ten minutes, Judge.

THE COURT: All right.

MR. COHN: Fifteen minutes.

They were missing one of those statements. Judge, we have a little problem. The next statement I was about to use, which is a lot like the last one, except on a different day, in which he also says Gaines, not Jack Schwartz, in that first night conversation. The Government says it does not have the original, and this is a photostat.

THE COURT: You do not have a copy, either?

MR. KIMELMAN: What the agent did in this case, your Honor, when he would get a statement from Suffolk County, he would retype it and put it in the FBI 302.

He has two out of the three statements that he retyped from the Suffolk County Police Department and he told me he does not have a third statement that he retyped.

MR. COHN: My only problem is going to be if this man says, like he said with reference to the last statement, I want to see my signature. I want to see

if it says sworn to. I don't care.

THE COURT: Has the Suffolk County Police Department got the original?

MR. KIMELMAN: I would presume so, your Honor.

THE COURT: Tell them to Xerox it and to send us a copy.

MR. KIMELMAN: Very good.

THE COURT: So if there is any problem about it, we will recall Mr. McGhee.

MR. KIMELMAN: Very good, your Honor.

MR. IANNUZZI: Just add to that, Judge, the copy that we do have has the notary and everything. Just not an actual specimen signature.

MR. COHN: That's correct. It's a typed -- a mimeographed copy.

THE COURT: It is conformed, a conformed copy.

MR. KIMELMAN: That's correct.

MR. COHN: Yes, sir.

THE COURT: Seat the jury.

(Jury present.)

THE COURT: I think we are ready to continue now.

Mr. Cohn, you may proceed.

MR. COHN: May I?

172a

Thank you, sir.

CROSS-EXAMINATION

BY MR. COHN:

Q Mr. McGhee, do you have a gun?

A No, I haven't.

Q Do you have access to a gun?

A No, I don't.

Q Did you ever have access to a gun?

A No, I haven't.

Q Do you know a detective in Suffolk who has a gun? Do you know any detective as social friends? Personal friends?

A One.

Q In the course of his duties, does he have a gun?

A Sure, he does.

Q Did you ever ask him if you could borrow it?

A No, I haven't.

Q Do you know a man named -- you've testified here about a man named William Cappiello; is that right?

A Yes.

Q Now, back in the winter of 1974-75, December '74, January '75, did you have occasion to talk to Cappiello about the fact that Gaines wasn't being paid either by you or Cappiello and that there was a problem?

A In January, did you say?

Q Well, let me ask you, did you at any time talk to Cappiello about the fact that you weren't able to pay, he apparently wasn't paying and that there was a problem with Gaines?

A I believe after the incident of the fire.

Q How about before the incident of the fire?

A No.

Q When did you see Cappiello before the incident of the fire or speak with him on the telephone?

A Well, he called me quite frequently.

Q You were in pretty constant contact with him, weren't you?

A He in touch with me.

Q He was in touch with you?

A Right.

Q You weren't in touch with him.

On one of those occasions when he was in touch with you, did you tell him that if anyone from Gaines came around to collect any money, you would blow that person's f'n brains out?

A No.

Q Did you tell him you had access to a gun?

A No, I did not.

MR. COHN: Can I have this marked for

identification, please?

THE CLERK: Document marked Defendant's E. bit O for identification.

(So marked.)

Q Would you please read this document and after you have read it, tell us whether it refreshes your recollection as to any conversation with Cappiello on the subject matter I have just questioned you about?

MR. KIMELMAN: May I see it, Judge?

A (Continuing) No.

Q Pardon me?

A No.

Q That does not refresh your recollection?

A Not at all.

Q Did you ever have a conversation with Cappiello in which you said, in words or substance, that if anyone from Gaines comes around, I will blow their f'n brains out?

A No, I did not.

Q You didn't.

Now, you -- Do we keep these or give them to the Clerk, your Honor?

THE COURT: Keep custody of those documents that come from your files.

Q By the way, with reference to that trailer, the

first thing you borrowed $4,000 from Gaines, in your first transaction -- do you recall that?

A Yes.

Q Did you give them back the trailer?

A The trailer?

Q What was it?

A A tractor.

Q Tractor.

Did you give them back the tractor?

A To whom?

Q Did you give it back to anybody?

A No. The tractor blew up in New Jersey, on the New Jersey Turnpike and William Cappiello was informed where the trailer was, where the tractor was because he was guaranteed on it. He said he wanted the tractor. I told him where it was. It's yours.

Q When was this?

A Some time during '74. I don't recall exactly when.

Q Did you notify Gaines?

A No.

Q You didn't tell Gaines?

A No.

Q Now, before -- I now want to turn to your

conversation, the one you taped with Jack Schwartz on May 2, 1975.

By the way, where did you have the tapes? Inside your coat or --

A No. In the back of my belt.

Q Back -- in your back pocket?

A No, no. In between -- in my belt, in my pants.

Q Hooked onto your pants and was covered up by a jacket; is that correct?

A Yes.

Q Of course you took pains to make sure the tape was covered up so Jack could not know you were taping him; is that right?

A Couldn't see it.

Q No. You intended that he shouldn't see it; didn't you?

A Yes.

Q Now, at the time you went in to see Jack Schwartz, you owed him approximately $5,000; didn't you?

A I thought it was approximately $5,000. I wasn't sure. That's why I asked for an agreement -- a copy of it, rather.

Q I see.

Did you go in to see Jack Schwartz for the

purpose of working out paying back the money you owed him?

A After the fire, you are speaking of?

Q Wait a minute.

A That's the only time I spoke to him really, anyway.

Q That's the only time, that has to be when I'm talking about. I said May 2, 1975. That tape that was played for the ladies and gentlemen this morning, when you went to see Jack Schwartz with the tape on your belt, hooked onto your pants, did you go in for the purpose of making arrangements to pay off the $5,000 you owed Gaines or did you go in for the purpose of trying to get Jack Schwartz to make threats recorded byyour tape?

A No. I went in to make an arrangement with him to see what happened with William Cappiello, why he wasn't paying it and to inform him -- to refreshing his memory that we did have an agreement with William Cappiello and him. The reason I asked him for the -- for the agreement that he made, that he gave William Cappiello releasing me of all obligation to Gaines Leasing, and I was trying to find out why was he coming after me if this is being paid, and if it wasn't being paid, why shouldn't he have notified me?

Q Now -- but at that point, on May 2, 1975,

whether you had been notified or not, by that point you knew that it was claimed you owed 5,000 and that Cappiello hadn't paid. That was clear, wasn't it?

A Yes.

(continued next page)

1 McGhee - cross - Cohn

BY MR. COHN:

Q All right.

So, knowing that, my question is: Did you go into Jack Schwartz on May 2, 1975, for the purpose of working out this $5,000 or did you go in for the purpose of trying to get him to make somekind of threats which would show up on your tape recorder?

A I went in for the purpose of making arrangements to repay the money, if it wasn't being paid.

Q do you customarily carry a tape recorder when you go into discuss making arrangements on money you owe?

A No, I did not. I was in fear of my life because --

Q I see. You were in fear of your life, so you tape recorded. You had gone to the police already?

A Yes.

Q You had seen every detective in the department, I think you said this morning; is that right?

A Not every detective. I seen them that night when the fire was --

Q Right. Where did you get the tape recorder?

A From the Police Department.

Q From the Police Department. They equipped

you with the tape recorder?

A They went in with me.

Q Pardon?

A They went with me for protection.

Q They went with you for protection. Where were they while you were talking to Jack Schwartz?

A Outside.

Q Outside. So you weren't in fear of your life with the police standing right outside, were you?

A They had to get into the building, first of all, if -- he carried a gun.

Q I see.

Q He always carried a gun every time I was there. With him and I in the office, anything could happen so they had to hear the conversation between me and Mr. Schwartz to find out if anything was going on.

Q And that's why you taped it?

A Yes.

Q And did youwant to tape -- were you hoping the tape would show some threats by Mr. Schwartz?

A Not really.

Q Were you hoping when you said time and again to Mr. Schwartz about this Grove -- garage fire, were you trying to get Mr. Schwartz to say that he in

any way authorized that irresponsible act?

A Not really.

Q You weren't trying?

A No. I knew it and he knew it.

Q You knew it and he knew it, but weren't you trying to get Mr. Schwartz to make threats and to say that he had in some way authorized this fire?

A No, I wasn't.

Q It was just a good faith effort on your part to come in and work the $5,000 out; is that right?

A To see what kind of agreement we could come to.

Q Okay. Fine.

And then I think it is -- as the tape shows, you came to some kind of agrement, what was it -- you said you continue to pay for six months. He asked you to pay sooner and what was discussed was paying $250 starting in August; is that about it?

A Yes.

Q That $250, you were supposed to start paying in August was considerably less than the monthly payments you had been -- supposed to be making, wasn't it?

A Yes.

Q They were six-oh-nine. This was two fifty;

right?

A Yes.

Q Were you pleased when Mr. Schwartz, after listening to you, said, "Well, what can you do? Can we work it out? How do we work it out, what can you"?

And that -- were you pleased when he said to you, "Start making the payments. You don't have to start making them until August and they could be for $250 a month"?

Were you pleased with that?

A I wasn't really pleased with it because I was going to have difficulty. That's why I asked for the extended time to start making those payments.

I wanted to give myself enough room to make them.

Q Were you pleased with the fact it was put down from $609 to $250?

A Without any equipment, not really.

Q You really weren't pleased?

A Not really.

Q but you did intend to pay the money?

A Yes.

Q The $250 starting months ahead of time, the obligation was certainly a lot better than the $609,

wasn't it?

A Yes.

Q And being a lot better than the $609, and not having to start until August, have you to this minute made a payment of one additional penny to Gaines?

A No, I did not.

MR. COHN: You can have you witness back, Mr. Kimelman.

THE COURT: Mr. Iannuzzi?

MR. IANNUZZI: Thank you, sir.

CROSS-EXAMINATION

BY MR. IANNUZZI:

Q MR. IANNUZZI: If I might have a moment, sir?

THE COURT: Yes, if there is any further discussion, I'd appreciate it if you went over to a corner of the Courtroom.

Disregard anything you hear at random or any conversation between lawyers. All you should be interested in is what comes from the mouths of witnesses, testimony, statements under oath.

Q Mr. McGhee, if I ask you a question you don't understand, would you advise me of that so I could rephrase it for you?

A Yes, I will.

Q All right.

Now, you were testifying in reference to the evening of April 21, 1973, when some men came to your home about 11:30 or midnight that night; is that correct?

A Yes.

Q And I believe you testified yesterday that -- withdrawn.

And you testified these people came, knocked on the door and your wife didn't open the door; is that correct?

A Correct.

Q But she shouted through the door, "What do you want," something to that effect?

A Yes.

Q And it is your testimony that you heard a Spanish accent; is that correct?

A Yes.

Q You didn't see the people?

A No.

Q And you say someone said Jack Schwartz; is that correct?

A Yes.

Q Now, is there any question in your mind, as you sit here now, that your recollection is that there

was a Spanish accent who was doing the speaking?

A That was two practically at the same time.

Q When you testified here yesterday --

A Two voices.

Q -- did you say that the person with the Spanish accent did the speaking?

A Only answered the questions that he asked.

MR. IANNUZZI: May I have a moment, sir?

THE COURT: Yes.

BY MR. IANNUZZI:

Q Is it your testimony now, that two people were speaking at the same time?

A Yes.

Q Now, do you recall yesterday testifying at Page 368 and being asked this question and giving this answer:

"Question: What happened when these individuals came to your house?"

And the answer is: "They knocked on the door and my common-law-wife asked who was it and it was a Spanish accent came out and says, 'Jack Schwartz.'"

Do you remember giving that answer?

A Yes.

THE COURT: You have to answer vocally.

THE WITNESS: Excuse me.

THE COURT: What was the answer?

THE WITNESS: The answer is yes.

BY MR. IANNUZZI:

Q And you didn't say that there were two people at the same time, did you?

A No, nobody asked me.

Q And nobody asked you about the Spanish accent? You were asked what was said; right?

A That's the voice that I could remember --

MR. IANNUZZI: Objection, if your Honor please, not responsive.

THE COURT: May I have the question?

(Question read.)

THE COURT: You say that's not responsive?

MR. IANNUZZI: It went on, I believe.

THE COURT: All right. Strike out the answer and objection sustained to the question, too. Improper in form.

BY MR. IANNUZZI:

Q When you were asked yesterday, this very quuestion: What happened when these individuals came to your house, you answered -- was this youranswer:

"They knocked on the door. My common-law-wife

asked who it was and a Spanish accent came out and says, 'Jack Schwartz.'"

A Yes.

Q Is that right?

A Yes.

Q Now, were you asked about a Spanish accent or was it you who testified about it?

THE COURT: Objection sustained. It is argumentative.

Q Are you sure it was a Spanish accent?

A Yes.

Q And was it -- when your wife did -- answered the door, does yourwife ordinarily answer the door at midnight or if anybody calls late?

A If I'm asleep.

Q Were you asleep this night?

A It woke me up.

Q I'm sorry. Go ahead. Finish your answer.

A As she was answering the door, answering the call, it woke me up.

Q And when you heard the voice, Spanish accent, were you in your bedroom or were you next to the door, near your wife?

A The bedroom is next to the door, sir.

Q So that you were there?

A Yes.

Q You were awake?

A I was awakened by the voices.

Q You were awakened sufficiently enough to heard the voice?

A Yes.

Q You didn't answer the door, did you?

A No, I didn't. Would you.

Q Was this an ordinary precaution for your wife to answer the door at that hour?

MR. KIMELMAN: Objection, your honor.

THE COURT: May I have the question?

Was it an ordinary precaution --

(Record read.)

THE COURT: Objection sustained.

F fls.

(Continued on next page.)

GRsf 1pm/3

BY MR. IANUZZI:

Q Was it your practice at home to have your wife answer the door instead of yourself?

MR. KIMELMAN: Objection, your Honor.

THE COURT: I'll allow it. It's a different question.

Is that the usual way it happens in your house?

THE WITNESS: No, it is not.

Q And when you were awake and when you did hear a voice at the door, did you go to the door and take over the conversation from your wife?

A No, I did not.

Q You let your wife continue the entire transaction?

A Yes, I did.

Q And was that on the basis of the fact that you knew you owed money and you were trying to avoid any of your creditors?

A No, it is not.

Q You never said a word to anybody at that time?

A You mean, the time they arrived?

Q Right, right at the door. Time we're

talking about?

A No, I didn't.

Q You never saw anybody who was standing there, did you?

Q Now, you remember giving a statement to the police, the very night that your garage burned?

A Yes.

Q On the 23rd of April, correct?

A In April. I'm not too good at dates, sir.

Q You don't remember the date that the garage burned? Could we have a concession from the United States --

THE COURT: Wait now. Wait now. Do you remember the night the garage burned?

THE WITNESS: Yes, your Honor.

THE COURT: What date was that?

THE WITNESS: I cannot remember. So much been going on in the year '75, so much -- I cannot remember the full transaction that happened at this particular time.

THE COURT: All right. Do you remember the day they first came to the door?

THE WITNESS: Yes, I do.

THE COURT: What day was that?

THE WITNESS: I believe it was on a Monday

night.

THE COURT: And can you recall how -- how many days after that, your garage was burned?

THE WITNESS: They came Monday night. They came back again Tuesday -- they came Monday night. Then they came back Tuesday morning. I went to Gaines on a Wednesday. I believe the garage burned Wednesday night.

THE COURT: All right. So, now you have it, Mr. Iannuzzi.

BY MR. IANNUZZI:

Q And that very night, that very Wednesday night you went to the police, right?

A They came to me.

Q And then did you go with them? Where, to give them a statement or did they take a statement from you in your house?

A No, we went to the precinct.

Q Very well. You told them what happened?

A Yes.

Q And they reduced it to writing, didn't they?

A Yes.

Q And you signed it?

A Yes.

Q And you signed it, as a matter of fact, in front of a detective, did you not?

A Quite a few of them, sir.

Q And were you there when the detective notarized your signature, you swore that it was the truth?

A Yes.

Q And -- I don't know if this has already been marked for identification, the original, sir. I think it was this morning.

MR. KIMELMAN: Yes.

MR. MC MULLEN: It should have been.

MR. IANUZZI: Do we have that?

MR. KIMELMAN: Look on the back.

THE COURT: Will you check with the courtroom deputy.

THE CLERK: It's written on top, Mr. Iannuzzi. On top of your exhibit.

MR. IANNUZZI: 3500-9.

BY MR. IANNUZZI:

Q I ask you, Mr. McGhee, if this is the document that bears your signature? Is that your signature, sir?

A Yes, it is.

Q And is this your -- this is four pages. Is

your signature on the first page, also?

A Yes, it is.

Q And is your signature on the second page?

A Yes.

Q And is your signature on the third page?

A Yes.

Q And is your signature on the fourth page?

A Yes.

Q And Mr. McGhee, when you signed that document, you read it, didn't you?

A Yes.

Q And when you read it, you signed it after you read it?

A Yes.

Q And you swore to the detective that it was the truth, after you read it?

A Yes.

Q And you signed all, each and every page of it, correct?

A Yes.

Q So you read each and every page of it, correct?

A Yes.

Q I ask you, sir, -- withdrawn. You did

indicate this morning that your memory of the event of April 21, 1975, was better on April 23, 1975, than it was yesterday, isn't that correct?

A Definitely.

Q And it is better then than it is today, isn't it?

A Sure, it is.

Q And on the evening of April 23, 1975, when you told the police about the two men who came to your house, did you tell them in any way -- withdrawn.

MR. KIMELMAN: Your Honor, --

Q Did you say this to them --

MR. KIMELMAN: Your Honor, I object to this line of questioning as being asked and answered by Mr. Cohn.

THE COURT: No. I will allow it. I don't know what the question is.

Q And did you indicate in your statement on April 21, 1975, at or about 12 midnight,"Two men came to my house and asked to see me. My wife answered the door and told them I wasn't home. They said they were from Gaines Leasing Company. They had a yellow Maverick. They told her they would be back Thursday."

Did you say that, sir?

A Sir, I would appreciate --

Q Answer yes or no, sir.

Did you say it on April 23rd to the police in that statement? It's right in front of you.

A You're trying to confuse me.

Q No, sir.

A You have three days here.

Q I'll withdraw it.

A You have the 21st, the 22nd and the 23rd.

Q The question is withdrawn.

Mr. McGhee, look at the statement in front of you, sir. The one that you read on April 23rd. The one you read completely and then signed and swore that it was the truth.

A Yes.

Q I ask you to look at that, sir. I ask you to look at the second page, the third or the fourth paragraph which starts: 'On April 21st, sir, and I ask you whether you told the police when your memory was much better of the event, whether you told them that a Spanish accent said anything?

A That doesn't say anything here.

Q Did the police write down what you were saying while you were saying it, sir?

A Sir, it's a possibility that --

MR. IANNUZZI: I ask the witness to answer.

THE COURT: Please answer the only question asked.

Q Did the police write down what you told them?

A Yes.

Q After they wrote it down, did you read it?

A Yes.

Q And after you told them, did they leave anything out?

A After I told them did they leave anything out?

Q Yes.

A The statement?

Q Yes.

A At that point, I don't think they did.

Q Now, as you look at that statement, does it say anything at all and I ask you to look to the entire rendition of what happened on April 21, 1975, and look at the four pages and is there anything in there about anybody with a Spanish accent on April 21, 1975?

A Not in this statement, as I see it.

Q Mr. McGhee, you went back to the police station the next day, didn't you?

A I'm not sure.

Q Well, didn't you make another statement, not to Detective Mequia, but to a Detective Misagedes?

A Yes, I believe so.

Q Wasn't it in fact the next day or shortly after the first night?

A I believe it was, sir.

Q And made another statement to a different detective?

A (No response.)

Q In other words, that statement was made to Detective Mequia, you made another statement to Detective Misagedes, did you?

A I don't know the detectives by name, sir.

Q Whatever the other detective's name was, you made another written statement and you signed another written statement in front of another and completely different detective; correct?

A Yes.

MR. IANNUZZI: Your Honor, if your Honor please, might we approach for just a second?

THE COURT: The Jury may be excused.

(Jury excused.)

MR. IANNUZZI: Might the witness be excused

or a moment, sir?

THE COURT: Take a place outside the Courtroom, sir.

(Witness leaves the Courtroom.)

MR. IANNUZZI: If your Honor please, this is the document that we do not have an original for and since this witness seems to be impressed by looking at his own signature, while we have a conformed copy, I don't know what reaction he's going to get and I don't know exactly how to use a conformed copy.

THE COURT: So why should we ask him to leave the Courtroom? I can't tell you, Mr. Iannuzzi.

There is one man that can tell you, Mr. Iannuzzi, there is one man that can tell you: who left the Courtroom.

Ask him to come back.

MR. IANNUZZI: If we can have a concession that this is an exact conformed copy by the United States attorney --

THE COURT: Why shouldn't he here.

MR. IANNUZZI: If you want him to.

THE COURT: That the Government represent that this is what he signed, we can't find the

original.

MR. IANNUZZI: Very well. Maybe that's the easiest way, sir.

THE COURT: Might I have it, please?

MR. IANNUZZI: Sure.

(Document handed to Court.)

(Witness resumes the stand.)

THE COURT: Mr. McGhee, this is a typewritten copy of something you signed.

Apparently we can't find the original.

It may be in the Suffolk County precinct, but the Government agrees that this is a copy. They typed in your signature of what you signed.

They say they got it from the Suffolk County police.

You go over it, look at it and see if you recognize the language and whether you will agree that you signed a statement and that that is a copy of that statement.

Apparently the detective's name is Mequia.

MR. IANNUZZI: Misagedes.

THE COURT: What is the detectives first name?

MR. KIMELMAN: Robert.

THE COURT: Does that statement look familiar

to you?

THE WITNESS: Yes.

THE COURT: Are you ready to concede you signed a statement of which that is a copy?

THE WITNESS: Yes.

THE COURT: Very well. Seat the Jury.

THE WITNESS: Your Honor --

THE COURT: Hold the Jury one moment.

THE WITNESS: There is a paragraph in here, also stating a Spanish looking fellow, one who came --

THE COURT: Mr. Kimelman has the right to take you on redirect examination and he will bring the matter out that he thinks is important that the defendant did not bring out.

Don't be concerned about what the defendant does not bring out.

Try to answer the questions put to you and try not to volunteer information.

All right?

THE WITNESS: Yes.

THE COURT: Very well. Seat the Jury.

(Jury present.)

(Continued on next page.)

BY MR. IANNUZZI:

Q Mr. McGhee, I have given you a copy of 3500-3, which is a typed copy of a statement.

that the statement that you gave to Detective Misagedes the next day?

A Yes.

THE COURT: In other words, you signed the original, didn't you?

THE WITNESS: Yes, I did.

Q While that doesn't contain your signature, you said sign the original; correct?

A Yes.

Q And that was signed in front of another detective by the name of Askew?

A Yes.

Q It was which -- by another detective by the name of Misagedes and you swore in front of him this was the truth?

A Yes.

Q And it is dated the 24th of April, 1975?

A 22nd.

Q would you look at the signature date, sir, at the back, the last page? Does it say April 24th?

A 4/25 -- 4/24.

Q 4024, sir?

A Yes.

2pm/2

BY MR. IANNUZZI:

Q Was your memory better on the second day after the fire than it was yesterday?

A Yes.

Q And was it better the second day after the fire than it is today?

A Yes.

Q And did you say to Detective Misagedes, the next day after you made the first statement to Detective Mequia, did you say to him in reference to April 21st, "I had no further business with Gaines Leasing until April 21, 1975, 11:30 p.m., when two white males came to my house and said they were from Gaines Leasing and they wanted to talk to me. My wife when she answered the door told them I was not home. One of them said, 'He must be home, his car is in the driveway.' My wife told them to go away and they left. About 15 minutes they returned, looking for me again only to be told by my wife that I was not home."

Did you tell them that?

A Yes.

Q Did you tell him and look at the statement, sir; did you tell him at any place in reference to April 21, 1975, that a person with a Spanish accent said

something about Gaines or Jack Schwartz?

A At that particular time, you're saying?

Q Exactly, sir, April 21, 1975, when you said that you heard a Spanish accent outside of your door at 11:30 or 12:00 o'clock at night. Did you tell either detective on the first night or the second night that there was anybody with a Spanish accent?

A (No response)

Q Yes or no, sir?

A I made this statement --

MR. IANNUCCI: Objection, sir, this is a question to be answered yes or no.

THE COURT: I don't know whether it can be. I'll ask the witness that.

You were asked to answer the question yes or not. If you cannot answer it yes or no, say you cannot answer it yes or no.

THE WITNESS: I cannot answer that yes or no.

Q Very well.

Did you make a statement to Detective Mequia on April 23rd that a Spanish person had been at the door, yes or no, can you answer that?

A Yes.

Q Did you tell him that?

A Yes.

Q And is it in the statement?

A Yes, it is.

Q I'm going to ask you to look at the statement of Detective Mequia that you signed, that's the four page document in front of you, with your signature on it.

A Are you referring to the following morning?

Q Sir, I am referring to the night.

Listen to this question very carefully.

April 21, 1975, you say that somebody came to your door at 11:30 or midnight, is that correct?

A Yes.

Q At that time you described that event, not the next day or the day after that, or any other day, but you described that event to the police, didn't you?

A Yes.

Q And you described it to two different policemen, didn't you?

A Yes.

Q And you described it to two different policemen who reduced it to writing, didn't you?

A Yes.

Q And you signed your name and you swore that

both statements were true, didn't you?

A Yes.

Q And you said this morning that those statements were true, didn't you?

A Yes.

Q Now, I'm asking this, sir: Does it appear in that statement, the first one, to Detective Mequia, that was made on April 23rd, did you tell him and did you reduce it to writing and did you sign it, that a Spanish person came to the door?

A I told him a Spanish person came to the door, yes.

Q You did tell him that?

A Yes, I did.

Q They didn't write it down?

A Excuse me?

Q Is that what your testimony is that that document --

THE COURT: Wait a minute. Give the witness a chance to answer.

Is it in that statement?

THE WITNESS: Yes, it is.

THE COURT: Read.

THE WITNESS: "A Spanish looking fellow was

the one who came to my door."

BY MR. IANNUZZI:

Q Is that the next d you're reading, April 22, sir?

A April 21, according to this.

Q Sir, if you're reading from this paragraph, I appreciate you starting right at the beginning and you read it right down, point out to this jury and this Court where you told that detective that a Spanish person came to your door on April 21. Start reading, sir.

THE COURT: Out loud?

MR. IANNUZZI: Please.

THE COURT: All right.

A "I had no further business with Gaines Leasing until 4/24/75, at 11:30 p.m., when two white males came to my house and said they were from Gaines Leasing and they wanted to talk to me. My wife who answered the door told them that I was not home. One of them said, 'He must be home, his car is in the driveway.' My wife told them to go away and they left. About 15 minutes later they returned, looking for me again only to be told that I was not home. They also came the following morning at 9:.5 a.m.--"

Q Now, sir.

THE COURT: Continue.

A "At 9:15 a.m., again looking for me after they stated they were from Gaines Leasing. They pulled up to my house in a yellow Maverick, a Spanish looking fellow was the one who came to my door. He stated that he was from Gaines Leasing. The fellow asked for Fred McGhee after I opened the door, I told him I was Fred McGhee --"

THE COURT: That's enough.

Q Now, you've read that, read it aloud.

A Yes.

Q When you told them about the Spanish fellow coming to your door, talking to you, that was the next day, wasn't it?

A Yes.

THE COURT: Objection sustained, it's argumentative.

Q Did you tell the detective --

THE COURT: I won't -- nothing more on that. The jury is excused.

(Jury leaves courtroom.)

SS/ffe
2pm/3

THE COURT: This statement says "They came back the next day," referring back to the same people that were there April 21.

MR. IANNUZZI: I am not asking him that.

THE COURT: I can't permit continued and extensive examination after it's clear as to what he said. You're arguing now as to what that statement means.

MR. IANNUZZI: I think, if your Honor please, you are interpreting a statement and you're interpreting it incorrectly. I would suggest, if your Honor please, most respectfully, that this is cross-examination. The document is written. It's very clear.

THE COURT: All right, if it's clear, then examination on that point is at an end.

MR. IANNUZZI: Your Honor --

THE COURT: I've had previous experience with you. You love to talk and you never give me a chance to explain, to put my determinations on the record. I find the determination in order that that area of examination has been completely exhausted. Finished. Don't go back to it.

Now seat the jury.

MR. IANNUZZI: If your Honor please, I'm not finished, if I might? There are other documents

relating to the same information, other signed documents, other statements.

THE COURT: Don't ask him whether in that statement he told any police officer that there was a Spanish-speaking or Spanish-looking individual. That's been exhausted. If you want to go to another statement fine.

MR. IANNUZZI: If your Honor please, I am going to suggest most respectfully that your curtailment, your attitude towards me which may have carried over from another trial is curtailing me, prejudicing my defendant and I'm going to move for mistrial.

THE COURT: Motion denied. You did the same thing at the last trial. I tried to explain to you at the outset I will hear argument briefly, come to the point and stop. When I make a determination, that's it. I won't go on forever.

MR. COHN: Your Honor, I have a brief motion to make relating to somewhat the same thing. The problem seems to be developing. We have two defendants in this case, Mr. Schwartz, of course, and Mr. Sarkis. Obviously we're not very happy about Mr. Sarkis being joined in the same indictment with Mr. Schwartz and it presents and I'm afraid,as the trial progresses, it's going to present a lot more problems wherein we're

3 goirg to suffer some prejudice, particularly, I can envision some situation where there might even be a Bruten situation arising. I don't know yet.

I've been very unhappy about that from the beginning. I know we moved for a severance and a motion for a severance was denied by your Honor. It further developed and let me say this very carefully at the beginning. In your conduct of the trial, your Honor has not only been gracious to me personally, timewise, you've ruled for me, ruled against me on various questions. Your Honor's rulings have been to my thinking extremely fair and your Honor has taken the trouble to explain them to me and I am totally not satisfied -- I'm gratified -- with the progress of the trial.

I'm afraid that I'm getting caught up as a by-product in the militancy of Mr. Iannuzzi and your Honor's resistance to that militancy and I just get a feeling I'm getting hurt in front of the jury by the exchanges that take place between the co-counsel and the Court such as the recent one. I'm not saying anything which would in any way mean to reflect upon your Honor's conduct of the trial or anything like that because your Honor has been extremely fair to us. I'm not criticizing Mr. Iannuzzi who has to try his

case his own way.

I guess it's a case of two different defendants, two different defense lawyers who simply have different ways of doing things and a Court which has different ways of feelings toward the different presentations being made.

My worry in the whole thing is that I'm just going to get caught in the middle and that my client is going to suffer in the eyes of the jury. That's it.

THE COURT: I can assure you it won't happen. As far as I'm concerned, Mr. Iannuzzi, after my say is finished, I've forgotten about it. It only regenerates when the same thing happens. The very same thing happened before. It's typical of Mr. Iannuzzi.

Mind you, he's demanding matters that I said he can get from Suffolk County. I tried to explain that any number of times. I asked the United States Attorney to give him, as a courtesy, get it to him.

Before the direct examination is over, he starts complaining he didn't get all the "3500 material." I said to myself, "My God, how many times do I have to cite United States against Percival?" When it comes to these things, I try to make my determinations, give my reasons, make it clear. I say, "Now, look, I'm not saying that this witness said in his statement --"

"Of course, I refer to the people that came to see me on April 21, 1975 as one being Spanish" but the statement is clear Mr. Iannuzzi states it's clear.

He argues, wants to continue it. Anything after that is surplusage, a waste of time. The statement is before the jury.

He says, "On April 21 two white men came to see me." Now, the jury sees Mr. Sarkis sitting there. Because he's Spanish does that mean he isn't white?

MR. IANNUZZI: Certainly not.

THE COURT: Then he says something else, "They came on the 22nd. Then they came later that day on the 22nd" or I don't recall "They" referring back to the people of April 21. That's my interpretation. You argue it's different people, but he said "they."

One of them who we identified as "they" were Spanish-speaking or Spanish-looking.

MR. IANNUZZI: Sir, if I can just suggest, the point is in reference to the first night. He's talking about two white men. I don't care who he's talking about, what color. We're talking about a Spanish accent, not the people, because he never saw them. He testified to that.

THE COURT: I know all about that.

MR. IANNUZZI: That's the point, sir.

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THE COURT: Maybe that's the point you can make, but the point I'm making is that there is a time when there's enough cross-examination on the point. When I feel it's exhausted and the answer to the Judge is "Judge, it's cross-examination;" the answer is "I have something that might strike something in the cross-examination --"

MR. IANNUZZI: Of course.

THE COURT: You can't go on forever just because you're a defendant.

MR. IANNUZZI: I understand that. I also think I should be able to explore the fact the man is speaking about two different times and he cannot testify about the second time that says it covers the first. That's the point,too, sir.

THE COURT: Mr. Iannuzzi I submit to you that is purely argumentative.

MR. IANNUZZI: I want to be able to bring it out before I argue it.

THE COURT: Do you remember they said "Came back on the 23rd" whether he meant the 21st, the same people or do you want to leave that to Mr. Kimelman?

That's the only other question I can see.

MR. IANNUZZI: Your Honor, what the next day means to him, maybe I can ask that.

THE COURT: The next day?

MR. IANNUZZI: The next day certainly isn't the same night.

THE COURT: Bring the jury back.

Go on. You go on your merry way, Mr. Iannuzzi.

MR. COHN: Wouldn't it be a blessing, for your health, mine and get a severance --

THE COURT: Never --

MR. COHN: Mr. Schwartz --

THE COURT: I couldn't take two trials.

MR. COHN: I don't think I'll be able to take one.

THE COURT: I've got three trials all set for May 3rd. I've got two more on May 10th. I can't fragment these cases.

I grant severances only in the most unusual case, a Bruten problem arises, sure. Mr. Kimelman knows he better not present a Bruten problem.

MR. KIMELMAN: No Bruten problem.

THE COURT: All right.

(Jury enters courtroom.)

CROSS-EXAMINATION

BY MR. IANNUZZI: (continuing)

THE COURT: You may proceed.

MR. IANNUZZI: Thank you, sir.

Q Mr. McGhee, you did testify yesterday and I think you did indicate to the police on that night something that happened the next day too; isn't that correct?

A Yes.

Q And the next day some people came to your house; isn't that correct?

A Yes.

Q And you testified about that, correct?

A Yes, I did.

Q In that statement just before you start talking about the Spanish person, for the very first time does it say "They also came back the following morning"?

A Yes.

Q And when it stops talking about the Spanish fellow, is it after?

A The following morning, yes.

Q It does?

Is there anything before it that says "They came back the following morning," anything about that in reference to April 21 that says anything about a Spanish accent, a Spanish person, a Spanish man or even the word "Spanish"?

A No, it doesn't.

Q In neither statement, neither the one you made

the 23r the very night or the next day?

A No.

Q By the way, youindicate that in the statement made on the 24th you indicate that the fellows came back about 15 minutes later; is that correct?

A (No response.)

Q On the night, the first night, they came back about ten minutes later?

A Yes.

Q I ask you to look at the statement you made the very night that this happened, the fire happened. The statement which actually bears your signature, do you have that in front of you,sir?

A (No response.)

Q In that statement in the last paragraph of the second page where you start telling the policeman about what happened on the 21st, is there anything in there that the men came back 15 minutes later?

A No, it's not.

Q If you testified -- Mr. McGhee, you testified that your memory, of course, is much better or was at the time you gave those statements to the police than it is right now or yesterday so which is the accurate statement; that the men came back once that night or twice that night?

A Came back twice that night.

Q So that, therefore, what you told the police the first night, right after the fire, was not true or was not accurate?

A How can I answer that?

Q Did you tell the police the first night that the men came and when they left they said "We'll come back Thursday"? Does it say that there, sir?

A We'll be back Thursday.

Q Doesn't it say they came back at all the second time, does it?

A You have two different statements.

Q I understand.

I'm asking you about that first one, that first night. Did you say anything about the men coming back 15 minutes later?

A No, it doesn't.

Q The next day you told them a different story, didn't you?

A (No response.)

Q The next day you told them they came back twice that night, the other statement?

A Yes.

Q Which is the more accurate rendition? Did they

come back once or did they come back twice?

A No, they came back twice.

Q So that what you said the first night, what you signed and swore to, that wasn't exactly accurate, was it?

A It was an error of the police department, not mine.

Q I understand.

When you read it --

A I overlooked it.

Q And you signed it, you either overlooked it or you didn't bother to tell them, one or the other?

A Overlooked it.

Q When you swore that was the truth it wasn't exactly accurate truth?

A Not knowingly.

MR. KIMELMAN: Your Honor, that's argumentative.

THE COURT: Objection sustained. Strike it out. The jury is to disregard it.

MR. IANNUZZI: Very good.

Q Did you have an opportunity -- let me ask you this: regardless of whether there was an accident or not, you didn't see the people who were at your door that night, did you?

A No, I didn't.

Q Although you were standing there and you saw what was going on, you never said a word?

A No.

Q You never saw anybody?

A No, I didn't.

Q Neither did your wife?

A No, she didn't.

Q You don't know who was at this door that night do you?

A I can say yes to that.

Q Well, let me ask you who did you see at the door?

A I seen no one.

Q And if you were to say that you could think it would be an assumption of who might be there, right?

A Not -- that remains. That's a question.

Q That's a question?

In other words, you don't know for sure who was there. Do you?

A Not really.

Q That's fair.

You're not testifying that you saw George there, did you?

A No.

Q On April 21 you didn't see George?

A No, I didn't.

Q Your wife didn't see George?

A On the 21st?

Q The night the people came at 11:30 or 12:00 o'clock and said they were from Gaines?

A No.

Q You testified also the men came back the next day?

A Right.

Q That was about 9:15 or 9:30 in the morning; isn't that right?

A Yes, it was.

Q Even came up with a yellow Maverick, right?

A Yes.

Q And, as a matter of fact, one fellow came to the door and the other fellow stayed by the car?

A Spanish guy came to the door.

Q One of them stayed in the car is the question?

A Yes, he did.

Q You gave -- you testified that only one came to the door, correct?

A Yes.

Q Which one was it, George Sarkis?

A Excuse me?

Q This fellow George here (indicating)?

A Yes.

Q You're sure that not both of them?

A Positive.

Q You're sure, positively, that not both of them came?

A Yes.

Q Do you remember when you gave a statement to Suffolk County police the very night that the event happened? Do you remember telling the police and that's the document with your signature on it in front of it on April 22, 1975, the bottom of the second page, sir, the one with your signature; says on April 22, 1975 about 9:15 a.m. two guys came to my front door". Did you tell them that?

A Yes.

Q Is that what you told the police the first day, the very first night, the same night as the fire?

A Yes, I told them -- there's another question there.

MR. IANNUZZI: If your Honor please, would you indicate to the witness that he should not make gratuitous remarks?

THE COURT: Might I have the question and his

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comment?

(Question and answer read by the reporter.)

THE COURT: Strike it out "there's another question there." Just answer the question. If it calls for a yes or no answer, answer it yes or no. If you can't answer it yes or not, say you can't.

A Would you repeat the question, please?

THE COURT: It's already answered.

MR. IANNUZZI: Might I proceed, sir?

THE COURT: Yes.

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(Continued on next page)

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Q And of the story that you told to the police the very night of the fire, the story you told the jury yesterday, which is accurate that two men came to your door the next morning, or one man, --

A One man.

Q That's your recollection now?

A That's the truth.

Q That's the truth you're telling now; is that right?

MR. KIMELMAN: Objection.

THE COURT: I will allow it.

Q Didn't you swear to the police on the night that two men came to the door, that that was the truth too?

A I'd rather not answer that.

THE COURT: Can you answer it yes or no? When you say I'd rather not answer it, that means you refuse to answer.

Do you refuse to answer?

THE WITNESS: No.

THE COURT: Then say you couldn't not answer it yes or no if you couldn't.

THE WITNESS: I couldn't answer it yes or no.

Q Did you tell the policemen that night that what you told him, did you swear to it to be the truth?

(Question read.)

A If I may, I'd like to say something here.

THE COURT: No, can you answer that question? Didn't you swear to tell the truth?

THE WITNESS: Yes.

THE COURT: Go ahead.

Q But your story now in April of 1976 is that this man George came to your door; is that right?

A Yes.

Q Before you came to court and identified the man sitting at counsel table as the man who came to your door the next day, had you spoken to Mr. Kimelman before you came to court?

A Are you referring to yesterday or today?

Q Yesterday?

A Yes, I spoke to him.

Q Did you speak to him the day before?

A No.

Q Weren't you here the day before and sat over here to day before?

A You're speaking of yesterday?

Q The day before yesterday, do you recall the day before yesterday coming into this courtroom and you didn't testify?

A I wasn't here.

THE COURT: The day before yesterday was Tuesday. We didn't hold court.

THE WITNESS: I was only here yesterday and today.

Q Never here on Monday of this week?

A No, sir.

Q Did you talk to Mr. McMullin at any time before coming to court yesterday?

A No. Not about any case or anything, just general conversation.

Q I didn't ask you what you spoke about. Did you talk to him about anything?

A No.

Q You have spoken to Mr. McMullin before, haven't you?

A Yes.

Q And as a matter of fact, didn't you speak to him in August of 1975?

A I'm not sure of the date, sir.

Q Didn't you speak to him at your residence at 31 Ontario Street, Huntington in August of 1975?

A I'm not sure of the date.

Q You remember Mr. McMullin coming to your house?

A Yes.

Q And you remember him showing you some statements to the ones you have before you?

A Yes.

Q Did you read them in front of him?

A Briefly,not thoroughly.

Q Was your attention directed to the statements you furnished to the Suffolk County Police on April 23rd, 1975 regarding your association with Gaines Leasing Corporation?

A Yes.

Q After your attention was directed to the statements did you tell Mr. McMullin that the statements were true and accurate?

A Yes.

Q To the best of your recollection?

A Yes.

Q You did?

A Yes.

Q And when you told him those statements in front of you were true and accurate, you read them, didn't you?

A Yes.

Q So again on August 13th, '75 you said what's

in those statements is true; is that correct?

A Yes.

Q Did you also tell Mr. McMullin that the person that you saw, that came to your door, the fellow who was Spanish or Puerto Rican that he had a terribly scarred face?

A Yes, not terribly scarred scarred, but pit marks.

THE COURT: You mean pock marks.

THE WITNESS: Yes.

Q Did you tell Agent McMullin that Richard McMullin, this man here, did you tell him that the Puerto Rican had a terribly scarred face?

A I don't say terribly scarred --

THE COURT: No, did you say that?

Not your present description, but did you say that to Special Agent McMullin?

THE WITNESS: You're asking me to say something that I'm trying to correct, the man --

THE COURT: If you didn't say it, say you didn't say it, but if you did say it, that's the answer.

Either you said it or you didn't. We're not talking about the truth of it. Did you tell

Special Agent McMullin that the man who came to you door had a terribly scarred face?

MR. KIMELMAN: I ask that the entire statement be read.

THE COURT: No. You can show it to him, if he doesn't remember.

MR. IANNUZZI: May I refresh his recollection?

THE COURT: There is no need to read the entire statement.

Q 3500-06 has already been marked. I ask you to look at the last paragraph of this and ask you if that refreshes your recollection as to whether or not you told Agent McMullin, the fellow,Spanish or Puerto Rican fellow who came to your door had a terribly scarred face, possibly from so kind of a skin condition?

A Yes.

Q Thank you.

Did you tell him that -- by the way, had you been in the courtroom at any time while the jury was here or not, before you identified Mr. Sarkis yesterday?

A No.

Q Hadn't you ever come in and sat at this bench while the jury wasn't here?

A Not that I can recall.

Q You don't recall during this case the defendant in this courtroom, you sitting here at this bench?

A I was only in the courtroom when I was asked to come in.

Q Did you know that the defendant in this case -- withdrawn.

Did you know that this case was prosecuting people who allegedly were involved in what occurred at your house?

A Yes.

Q And that would include the Puerto Rican fellow who was at your house?

A Yes.

Q And you knew that he was a defendant in the case, didn't you?

A Yes.

Q When you came into this courtroom and were asked to point him out, you knew that that was the defendant's table over there, didn't you?

A Did I know it at the time?

Q Yes.

A Yes.

Q And did you, by the way, in August, August 13, 1975, did you --

THE COURT: Did you know that that was the defendant's counsel table?

THE WITNESS: Not really.

THE COURT: Did you understand that the defendant would be sitting at that table?

THE WITNESS: No, I didn't.

MR. IANNUZZI: May I proceed? I didn't mean to interrupt you.

THE COURT: Go ahead.

Q Did you tell Agent McMullin in August of 1975 when you told him the defendant had a terribly scarred face that you would be able to easily recognize him if you saw a photograph of him?

A Yes.

Q And did there come a time as recently as last week that you were shown some photographs?

A Last week? No.

Q Now -- how long on April 21st, 1976 -- do you know what April 21st, 1976 what that was?

A I believe that was Wednesday.

Q And on that day were you shown by Agent McMullin photographs of various people, yes or no?

A Yes.

Q Did you pick a photograph out?

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A No.

Q You didn't?

A No

Q You didn't select a photograph?

A No.

Q You didn't indicate a photograph that was not the defendant? Is that your testimony?

A No.

(Continued on the next page.)

MR. IANNUZZI: If your Honor please, I would like to have a concession by the United States Attorney in reference to the fact that this defendant on April 21st, '76 was shown photographs and in fact, picked out the wrong photograph and did not pick out a picture of this defendant, but someone completely different.

MR. KIMELMAN: If counsel would proceed by asking questions --

THE COURT: No concessions. You ask the witness what happened. That's the way to do it.

Q Were you shown photographs on April 21st, '67?

A Yes.

Q Did you in fact pick out a photograph?

A I didn't --

Q You didn't pick out any photograph?

A I didn't make any positive identification.

Q Did you pick out a photograph of anybody?

A No.

Q Did not?

A No.

Q Did you pick out a photograph stating that the photograph you picked out was the only photograph of an individual having scars or pot marks on his face, the

distinctive characteric of the Puerto Rican?

A Did I pick out a photograph?

A Yes, I believe I did.

MR. IANNUZZI: Would the United States Attorney concede?

THE COURT: Continue your examination. If he wants to make a concession he'll rise and do it.

Q Do you know whether or not the defendant's picture was amongs those you saw?

A No.

THE COURT: If you want to ask him for a concession, ask him privately. Yes, over in the corner, quietly.

Q And of the one you picked out or indicated it was the only one that had the skin condition or pot marks or whatever it is, on his face. You did pick that one picture out in that fashion, didn't you?

A A semblance, yes.

Q You didn't pick out any of the others, did you?

A No.

Q Do you know if the picture you picked out was the defendant?

A No.

Q Did Mr. Kimelman or Mr. McMullin tell you that it was not?

A No.

Q Did Mr. Kimelman or McMullin indicate you picked out a picture other than the defendant?

A No.

Q Did they indicate that the defendant's picture was there and you didn't pick it out?

A No.

Q I show you 3500 material and ask you to read that and see if it refreshes your recollection as to what you did on April 21st, '76 with reference to photographs.

A Yes.

Q Does that refresh your recollection?

A Resembles.

Q Does it refresh your recollection that you picked out one photograph?

A No, two.

Q I will ask you to look at it again, sir.

Read it and see if it refreshes your recollection as to how many photographs you picked out.

A Oh, I see.

Q Does it refresh your recollection?

A Yes.

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THE COURT: That is not intended to just parrot what is on the statement.

Does that refresh your recollection as to what actually happened last week?

THE WITNESS: Yes.

Q In refreshing your recollection does it indicate you picked out a photograph?

A Yes.

Q Is it your testimony you were not advised that was not the defendant?

A No.

Q You indicated the person that came to your door on April 22nd has bushy hair?

A Long hair.

Q Did you say he had bushy hair?

A It looked like it wasn't combed all night.

Q Was it an Afro or just discheveled and not combed?

A Just discheveled and not combed.

Q Was it stringy hair, did you describe it as?

A I would say yes.

Q And you indicated that the person who talked to you on April 22nd indicated that -- withdrawn.

The people who came on April 22nd, at any

time if I confuse you with the dates, because I know there are several of them, just tell me.

On April 22nd, the morning, 9:15 or 9:30, you say two people came to your door.

A Yes.

Q They came in a yellow Maverick; is that correct?

A Yes.

Q Now, the man with the accent spoke to you.

A Yes.

Q He was the only one who came to the door, is your testimony now.

A At the beginning.

Q Did you identify yourself and say "I'm Fred McGhee?"

A No.

Q Did he ask you who you were?

A Yes.

Q Did you tell him you were Fred McGhee?

A At the beginning, no.

Q You told him you weren't?

A I was not.

Q Someone came to your door and when somebody asked for you you told him that's not me; is that right?

A Yes.

Q And the fellow who said to you is that your father --

A Yes.

Q -- what did you say?

A Yes.

Q You told him it was your father?

A Yes.

Q Was that your ordinary practice to not identify yourself when anybody came to the door?

A No.

Q But you did on this occasion?

A Yes, I did.

Q Did the fellow speak to you about money that you owed to Gaines Leasing?

A Yes.

Q Spoke to you about $5,000?

A Yes.

Q Said that you owed $5,000 and he came out or whoever came out wanted to collect that money; is that right?

A Yes.

Q And then in talking about the $5,000 you indicated that you weren't going to pay it or you couldn't

pay it or something like that; is that right, or you didn't owe it, is that right?

MR. KIMELMAN: I object to the form of the question.

THE COURT: I will allow it in that form.

Did that happen?

THE WITNESS: Would you repeat the question, please?

THE COURT: Mr. Miele -- all right, rephrase it.

Q When the fellow started speaking about the $5,000 a conversation ensued as to how much was owed or if you owed it or if Capiello owed it, but in any event you talked about the money?

A Yes.

(Continued on the next page.)

Q Okay. Then it got to a point where the fellow said well, what can you come up with? Come up with $2500?

A Yes.

Q Well, if you wait a week, can you come up with $1500; is that right?

A Yes.

Q And didn't there come a time when this other fellow, not the Puerto Rican fellow that you say was at the door, but the other fellow, the shorter fellow, the heavyset fellow came up and he was at your door, too?

A Yes.

Q Right?

A Yes.

Q And up to this point had this fellow who was at your door, this Spanish fellow, spoken to you about anything, other than $5,000, $2,500, $1,500, money that was owed to Gaines Leasing?

A You want a yes or no answer or you want me to --

Q I want a yes or no answer, if you can answer it yes or no.

A Yes.

Q What?

A Yes.

Q You are saying he did speak about other things?

A No.

Q That's what you are talking about? He was talking to you about money, listen, I have to collect some money for Jack Schwartz, $5,000, can't pay it? $2,500? I don't think I can make it. How about a week, can you do $1,500?

That's what the conversation was, in sum and substance; wasn't it?

A Not really.

Q All right. Was it about something other than money?

A It was about like he had a job to do.

Q I'm asking you what your conversation was.

A That's what I'm trying to explain to you.

Q All right. Did he ask you for $5,000?

A Yes, he did.

Q Did you tell him you weren't going to pay it or that you didn't owe it to him because of Cappiello?

A I told him I didn't have the money.

Q You told him you didn't have the money?

A Right.

Q Then did there come a discussion about when you could pay some money?

A Yes, I believe there did.

Q And the figure $2,500 was mentioned?

A YEs.

Q And then if you wait a week, maybe come back in a week or come back tomorrow or come back sometime, can you have $1,500; is that right?

A Yes.

Q That was the conversation; wasn't it?

A Yes.

Q This white fellow, this other fellow, in other words when you said the white fellow, other than the Puerto Rican fellow, they came to the door; right?

A Yes.

Q Okay. That was Grove Ebbert; wasn't it?

A Yes.

Q And you knew Grove Ebbert from other occasions and from before April 21 or April 22, 1975; didn't you?

A Not at the present time, no, I didn't. Never seen the man before in my life.

Q You had spoken to him?

A On the phone, yes.

Q And you had spoken to him several times in reference to Associated and repossessions of trucks or difficulties in payments; isn't --

A I wouldn't say "several times."

Q Pardon me?

A Maybe two or three times, yes.

Q Yes. And is it your testimony that you didn't know it was Grove Ebbert?

A No, I didn't.

Q You didn't recognize his voice?

A Not at the present time, no.

THE COURT: When you say "not at the present time," you mean not then?

THE WITNESS: Not then.

THE COURT: All right.

THE WITNESS: No.

Q Didn't you recognize his voice?

A Not then, no.

Q Didn't he identify himself to you?

A No, he didn't.

Q You are positive of that?

A He told me from Gaines Leasing. He didn't tell me his name.

Q I'm asking you whether he identified himself by name. That is to say, I am Grove Ebbert?

A No.

Q Never did that; right?

A Not that I could recall.

McGhee-cross/Iannuzzi

Q Now the question is, is it that he may have been but you don't recall it or he didn't?

A That morning he didn't.

Q So now your testimony is that he did not? That's a fact, he did not identify himself?

A No.

Q Do you remember on November -- withdrawn.

October 23, 1975 you came to this building? You came to this building in the office of Mr. Steven Kimelman who sits here. You know Mr. Kimelman?

A Yes.

Q Do you remember coming to his office in October?

A Yes.

Q And you remember that you came and McMullen was there and Mr. Kimelman was there; is that right?

A I don't recall that Mr. McMullen was there but Mr. Kimelman was there. I'm not sure.

Q Well, for sure Mr. Kimelman was there?

A Yes.

Q And you remember talking to Mr. Kimelman at that time and going over the events that occurred on April 22, 1975? Do you remember that?

A Yes.

Q Wasn't Mr. McMullen there because he was taking notes?

A It's a possibility. He could have been there.

Q Either Mr. McMullen was taking notes or Mr. Kimelman was taking notes; is that right? Somebody was taking notes; weren't they?

A I believe so.

Q Did you say to Mr. Kimelman on October 23, 1975, the white male -- withdrawn.

Did you say that the other individual at this time was waiting in the car but then he came to the door while you were speaking to the Hispanic and you told both of the individuals that Victor Mignoli had assumed the legal o bligation, was supposed to pay Schwartz the money and that the white male identified himself as Grove Ebbert? Did you tell that to Mr. Kimelman?

A I can't recall, sir.

Q Well, I'll show you some 3500 material. I'll ask you to look at this and see if that refreshes your recollection. Does that refresh your recollection, sir?

A Yes. Yes, it does.

Q And in refreshing your recollection, sir, it is a fact that you did tell Mr. Kimelman on October 23, 1975 that the white male identified himself as Grove Ebbert;

right?

A I can't be sure of that, sir.

Q Well, why don't you read this again?

A I did read that but it could be an error. There could be a mistake because --

Q In other words, in addition to the Suffolk County police making the mistake --

THE COURT: Objection sustained.

Q Are you saying that you didn't say this to Mr. Kimelman?

A I'm not sure, sir.

Q You may have said it to Mr. Kimelman?

A Possibility.

Q So you may have said that the white man or the other fellow who came to my door after the Hispanic was there identified himself as Grove Ebbert?

A I don't know about the identification, identifying himself; but I found out it was Grove Ebbert.

Q No, I'm asking you, sir, whether this refreshes your recollection as to whether or not --

THE COURT: Do you have to have your recollection refreshed? Does that document help you at all?

THE WITNESS: Not really.

THE COURT: All right, Mr. Iannuzzi.

Q Do you know whether or not you told Mr. Kimelman that Grove Ebbert identified himself when he came to your door? Can you recall whether you told him?

A No, I can't recall.

Q You have no recollection of telling him that?

A I can't recall.

Q If -- would perusing this document refresh your recollection?

A I doubt it very much, sir.

Q Would you like to look at it again?

A No.

Q Are you saying and testifying to this jury and this Court that you in fact did not say that to Mr. Kimelman?

A No, I'm not.

Q You're not testifying to that; are you?

A No, I'm not.

Q What is your best recollection, that you did or did not?

THE WITNESS: Your Honor, it's a possibility that I could have did it and I could not have did it because I had a lot of problems in September. I lost my son.

THE COURT: All right. Do not tell us about it.

Strike that out.

THE WITNESS: I can't remember all of this.

THE COURT: Strike that out.

Q By the way, what you told to Mr. Kimelman when you came to this building, were you telling him the truth?

A The best of my ability, yes.

Q Now, after this fellow who came up and maybe he did and maybe he didn't identify himself as Grove Ebbert, was standing at the doorway, did the conversation continue about the $5,000 and whether the Mignoli agreement absolved you from your debt, whether it didn't, whether you still owed the $5,000?

A Yes, it did.

Q All right. Now, at that time were you nervous?

A Yes, I was.

Q And with two fellows facing you, perhaps, did that make you more nervous?

A Yes.

Q Do you know if you manifested any of your nervousness, if the people who were standing talking to you could see that you were nervous? Do you know that?

A No, I don't.

Q Well, up to this point, as you are standing

in the doorway and the two men are there and you are having a conversation about the 25, the 5, the 15, et cetera, the entire conversation about Mignoli, Cappiello, Schwartz, did the Puerto Rican fellow, the Spanish fellow, did he grab you?

A No, he didn't.

Q Did he pull you?

A No, he didn't.

Q Did he push you?

A No, he didn't.

Q Did he punch you?

A No, he didn't.

Q Up to the point that he was leaving after having a discussion we'll come back Thursday, maybe you could make 1,500, maybe you could make 2,500, whatever it is, whatever figures, whether you agreed to them oryou didn't, up to that point, did he attempt to reach out for your throat or your shirt or your hand or your arm? Anything?

A No.

THE COURT: Did he make any threatening gesture of any kind whatsoever?

THE WITNESS: He only told me --

THE COURT: No. Gesture? Gesture means movement.

THE WITNESS: No.

GR:jk 4pm R]

Q As a matter of fact, sir, at that point and during this conversation did the Spanish fellow assure you, did he say to you he didn'twant in any fashion to cause you any physical harm? Did he say that?

A Yes.

Q Do you know whether he did that as a result of seeing that you were nervous, with two people standing in front of you?

A I don't know, sir.

Q But, in any event, he did say, I don't want to cause you any physical harm?

A I don't want to hurt you.

Q I don't want to hurt you? Something like that; right?

A Right.

Q He didn't say, I do want to hurt you. He said I don't want to hurt you?

A Right.

Q And then he turned around and started to walk away, didn't he?

A There was a few phone calls made. You're leaving part of it out.

Q All right.

A I don't know why --

Q These men who were standing at the doorway came into your home, right?

A Yes.

Q Made a phone call?

A Right.

Q They didn't wreck your furniture?

A No.

Q They didn't slap you in the face?

A No.

Q They didn't pour anything on your floor, didn't pull your drapes down, didn't do anything and pick up your phone and use it in the ordinary fashion as supposed to be used for; is that right?

A Right.

Q Didn't hit you in the head with it?

A No.

Q Didn't say I am going to hit you in the head with this?

A No, he didn't.

Q Did that fellow, that Puerto Rican, the fellow that you said was George, did he pick up the phone and threaten you with it?

A No.

Q In the house, outside the house, any time?

A He didn't touch the phone, no.

Q So then was there a phone call made and there was more discussion; right?

A Right.

Q And then the fellow George that you've identified as George and this fellow that identified him or maybe he didn't identify himself as Grove Ebbert, did there come a point when they started to leave?

A Yes.

Q Up to that point, did George in any fashion make any threatening gestures?

A At that point he is standing on the stoop. He told me -- would you like me to repeat what he told me?

Q I am asking whether he made any threatening gestures. I am not asking you what happened when they were leaving. I am asking you up to the point they were leaving, did he make any threatening gestures? Did he say anything except I don't want to hurt you?

A No.

Q As these people left, did somebody threaten you?

A Yes.

Q As a matter of fact, you say that somebody said "I'll be back Thursday"?

A We.

Q Oh, it's "we"?

A Yes.

Q Wasn't I will be back Thursday and I'll break your legs?

A That was another error. It was we.

Q What do you mean it was another error? What's another error, sir?

A In the statement. I seen that. I underlined it and stated that was an error made there.

Q The police made an error when you told them on April 23rd, the very night of the fire, that Grover Ebbert said I'll be back Thursday and I'll break your f'n legs; is that right? Are you saying that's an error?

A We'll be back Thursday and you'd better have the money.

Q I'm asking you a question, sir, and the question is this: You told the police on April 23, 1975 when your memory was much better than it is now when you're talking here --

THE COURT: Objection sustained.

Q Your memory was much better then; wasn't it?

THE COURT: That is one question.

A (Continuing) Yes.

Q Isn't that correct?

A Yes.

THE COURT: That has been asked before. Now the next question.

Q Did you tell the police that night, April 23, 1975, the very evening of the fire, that Grove Ebbert was the one who threatened you and he said I'll be back on Thursday and I'll break your f'n legs? Did you say that to the police?

A Part of the statement is right and part is wrong.

THE COURT: No. Did you say it t4 the police and not whether it is right or wrong. Did you say it to the police, I and not we?

THE WITNESS: No.

THE COURT: No?

THE WITNESS: Not that I could recall.

THE COURT: All right.

MR. IANNUZZI: May I have a moment, sir, just to --

BY MR. IANNUZZI:

Q Now, did you tell on April 24, the next morning, Detective Misezedes in front of Detective Askew, "The white male who I later learned to be Grove Ebbert of

Freeport said, I'll be back Thursday and you'd better have 1,500 or I'll break your fuckin' legs. They both then left."

Did you say that?

A I don't recall.

Q Well, I ask you to look at this document, sir, which is 3500-4. I believe you have a copy here in front of you.

I am going to ask you to look at the last page, where your signature appears and I am going to ask you if it appears there, that you in fact told the police that Grove Ebbert, Grove Ebbert, the white male, turned to you and said, "I'll be back Thursday and you'd better have 1,500 or I'll break your fuckin' legs and they both left."

A No.

Q It didn't appear there and you didn't say that?

A It appears here.

Q It appears there?

A Yes.

Q Is it your signature that appears there under or what would be your signature as the United States Government has indicated this would have been your signature?

A Yes, yes.

Q And you read it before you signed it; didn't you?

A Yes.

Q And you swore in front of Detective Askew that it was in fact the truth?

A Yes.

Q And you swore in front of Detective Misegedes that it was the truth?

A Yes.

Q And now you are telling this jury something else and you are telling them that that's the truth?

A Yes.

Q Now you indicate -- by the way, were you still nervous after these people left your house?

A Definitely.

Q By the way, in addition to that threat about I'll break your f'n le[illegible], was there any other threat then? Anything else said?

A No, they left.

Q That was it? That was the only statement that was made to you?

A Yes.

(continued next page)

BY MR. IANNUZZI

Q The one that you told the police Grove Ebbert said; right?

A Yes.

Q Were you frightened the next day, April 23, 1975?

A Yes.

Q And on April 23, 1975, did you say that -- the same two individuals came back to your house?

A Yes, they did.

Q Sometime in the afternoon, perhaps, or late evening?

A Around 5:30, 6:00 o'clock.

Q 5:30, 6:00 o'clock, something like that; is that right?

A Yes.

Q When they came back to your house, did you see them?

A Yes, I saw them;

Q And when you saw them, thesepeople who you say had threatened you, did you go to the door and answer the door?

A No, I didn't.

Q Who answered the door?

A My daughter.

Q How old is this girl?

A Thirteen.

Q You let the 13-year old girl answer the door to two people who you were frightened of; yes or no, sir?

A Yes.

Q By the way, did that fellow George grab her, slap her, threaten her or do anything of that sort?

THE COURT: Wait, Mr. Iannuzzi.

Did he make any threatening gestures of any kind toward your daughter?

THE WITNESS: No, your Honor.

THE COURT: Okay. That should complete the examination in that area.

Q Did he say anything threatening to her?

A I couldn't hear the conversation, sir.

Q But did she cover for you, say you weren't there?

A Yes.

Q Was that again part of your ordinary practice?

A I knew who they were.

Q And you let the daughter answer the door?

A Yes. I didn't let her answer the door. She answered the door on her own. I seen them coming up.

Q When you saw them coming up, you didn't stop her although you were frightened? You didn't stop her from going and facing these two people, did you?

A No, I didn't.

Q Now, these men went away, did they not?

A Yes, they did.

Q And you say that you saw an automobile, shortly thereafter, you left your house and you saw an automobile near Danny's Den or something like that?

A Yes, sir. Yes, I did.

Q When you saw that automobile at Danny's Den -- by the way, what is Danny's Den, a bar?

A Yes. A topless joint.

Q A topless joint?

A Yes.

Q Near wherever you are?

A On Jericho Turnpike.

Q Freeport or Huntington, wherever it is?

A Jericho Turnpike. Six --

Q Okay.

You say you called the police at that time, this friend of yours or some other policeman?

A Yes, I did.

Q And did you tell them that the two fellows

who threatened me were in the bar?

A Yes I did.

Q Did the police come?

A No, he didn't.

Q The police arrest them?

A No, they didn't.

Q Did you go and fill out a complaint?

A No, I didn't.

Q The police didn't indicate to you go in the bar and talk to them, we'll be right over, we'll come and arrest them?

A No.

Q They didn't do anything except said if they come back again, call us again?

A Told me to go home. Lock the door. If they come back again, call the Suffolk County police.

Q By the way, at that place, that topless joint, Danny's, did you see George there?

A No.

Q Did you go in?

A No.

Q You don't know if he was there any more, did you?

A No.

Q You don't know if he had gone back to New York or Puerto Rico or anything else at that point, did you?

A I never said he was there, no.

Q I'm asking you, you don't know if he was there or not?

A No.

Q Or whether he went back to see Jack Schwartz and he was not even in Nassau, Suffolk or whatever; right?

A No.

Q And you went home sometime thereafter and a phone call was received in your hourse; right?

A Yes.

Q And at that time there was a conversation about money on the phone? You didn't answer the phone, did you?

A No.

Q Well, did you tell the Grand Jury that in fact you were the one who answered the phone and not your wife?

A No.

Q You remember testifying in front of the Grand Jury, don't you?

A Yes.

Q On November 13, 1975?

A Yes.

MR. IANNUZZI: Bear with me one moment, Judge.

MR. ROSEN: Page 22. Might be 22.

Q Did you -- were you asked this question, at Page 22, on November 3, 1975, and did you give this answer:

"Question: And who spoke with him?

"Answer: Mrs. Thompson. I'm sorry. Her daughter went to the door first. She said I wasn't home and then they left and they said they would call back, and they did. And I spoke to them on the phone."

Did you give that statement to the Grand Jury?

A I don't recall making that statement. I know she answered the phone.

Q Would the district -- or the U. S. attorney conceded I read the Grand Jury minutes properly?

MR. KIMELMAN: Your Honor, I'll -- I'm going to object to all these asking about -- if counsel --

MR. IANNUZZI: These are the Grand Jury

minutes.

THE COURT: Well, I will --

MR. KIMELMAN: If --

THE COURT: Is it certified the official record?

MR. KIMELMAN: Does he wish to put the entire Grand Jury minutes in?

MR. IANNUZZI: No.

THE COURT: That's not the answer, Mr. Kimelman.

MR. IANNUZZI: I'm asking if I read it right.

THE COURT: That's a proper request, as to whether the Government concedes that the reading was accurate.

MR. KIMELMAN: Your Honor, the Government will concede nothing. He can ask the witness questions.

THE COURT: All right. Continue.

BY MR. IANNUZZI:

Q I'm going to ask you, Mr. McGhee --

THE COURT: May I see the minutes?

MR. IANNUZZI: Certainly, sir. I would ask your Honor to take notice of it, please.

THE COURT: I can't, testify. I'm here as

the Judge.

MR. IANNUZZI: Very well.

THE COURT: You have the original, Mr. Kimelman?

If the Government won't concede the accuracy of the minutes, then have the stenographer here immediately.

MR. KIMELMAN: Your Honor, the Government will concede the accuracy of the minutes.

I don't believe that was what was asked of the Government.

THE COURT: I understand that was all that was asked.

MR. IANNUZZI: No. I think I was asking if I read it accurately. Perhaps that was the problem.

THE COURT: All right. Then we will have both concessions, that the minutes were accurate and that Mr. Iannuzzi read it accurately.

All right.

BY MR. IANNUZZI:

Q Mr. McGhee, I'm going to show you this document, the first question, the first answer, the Grand Jury minutes, Page 22.

9 McGhee - cross - Iannuzzi

I'm going to ask you if that refreshes your recollection as to whether you told the Grand Jury that in fact you answered the telephone that night?

A Where is it located?

Q Right, the first question and the first answer, sir.

Did you tell that to the Grand Jury?

A I believe I did, sir.

Q Of course, you were under oath when you were at the Grand Jury?

A Yes.

Q And what you told them was the truth, wasn't it?

A Yes.

Q And now you are saying that your wife answered the phone; is that right?

A Yes.

Q And that's the truth, too, isn't it?

A It can't be the truth if both of us answered the phone.

Q You said both things so which one is the truth?

A I believe I answered the--the phone and she talked to him.

Q You picked up the phone and handed it to her without finding out who it was or you found out who it was and then gave it to her, which is it, sir?

A I found out who it was and she wanted to talk to them.

How is that?

Q And you didn't hear what anybody was saying on the other side, did you?

A No, I didn't.

Q And you don't know what they said to her from your own listening to it, do you?

A N .

Q And then sometime thereafter, you indicate that you heard a noise coming from the garage; is that right?

A Yes.

Q I think you described it similarly as a whoom, a blowing noise, or a -- not a big bang, like TNT or anything like that, was it?

A No.

Q You were watching television at the time?

A Yes, Iwas.

Q Where was the television? In the bedroom, the l. ing room?

A In the bedroom.

Q So you were in the bedroom watching T.V.; is that right?

A Yes.

Q You say you heard a noise?

A Yes.

Q Did you hear anybody come up to the house, just before you heard that explosion?

A No, I didn't.

Q Did you see anybody come up to the house before that explosion?

A No, I didn't.

Q You heard the explosion and then you testified that you went out, saw flames and either you and your son or you yourself and then your son after came out and tried to put the fire out; is that right?

A No, I didn't testify that, sir. You asked the question correct, I can answer it for you.

Q I beg your pardon?

A If you ask the question correctly I can answer it for you. I didn't say that.

Q Did you go out and try to put the fire out; is that directly enough?

A Yes.

Q Let me ask you this; is that direct enough, first?

A Yes.

Q Okay.

Now, answer the question.

Did you go out and try to put the fire out?

A Yes, I did.

Q Okay. Thank you.

And did you see George there?

A No, I didn't see George.

Q Did you see anybody?

A No, I didn't.

Q Did you see -- you say you heard footsteps?

A I heard someone running down the driveway is what I said.

Q Okay. Did you say you heard footsteps?

A Yes.

Q Oh. And did you see who that was?

A No, I couldn't see who it was.

Q Do you know if it was somebody from the street who had run to see the flames, was running for the Fire Department, do you know that?

A Impossible.

Q Do you know for a fact that it wasn't?

A Yes, I know for a fact.

Q How do you know for a fact who it was from having perceived who it was?

A No, I don't.

Q So you don't know who it was?

A No.

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THE COURT: Now, knowledge is obtained in any number of ways. For example, I know that George Washington was the president of the United States, our first president and you know I never saw him in the White House. That's part of knowledge.

So, when you ask, "Do you know," knowledge can come from many sources. Did you see is a different question, Mr. Iannuzzi.

MR. IANNUZZI: I think it's already been asked and answered.

THE COURT: All right.

Read that last question.

(Read)

THE COURT: The question was not: Did you see who it was. The question is: Do you know who it was.

MR. IANNUZZI: I'm objecting, if your Honor pleases. Because I think --

THE COURT: Did you understand when Mr. Iannuzzi asked a question, did you know, he was asking whether you now know who it was?

MR. IANNUZZI: Objection, sir. May I object?

THE COURT: Now, look Mr. Iannuzzi, I have the right --

MR. IANNUZZI: Of course you do.

THE COURT: -- as the Judge, --

MR. IANNUZZI: Yes, sir.

THE COURT: -- to make certain that the witness is not confused. When I'm asking a question, please don't interrupt me.

MR. IANNUZZI: May I make an objection or should I not do that, sir.

THE COURT: Don't do it until I'm through.

MR. IANNUZZI: Very well, Are you through, sir?

THE COURT: No.

MR. IANNUZZI: Very well.

THE COURT: Will you please sit down.

MR. IANNUZZI: I'll sit down. You want me to sit down?

THE COURT: Right there.

MR. IANNUZZI: Right here?

THE COURT: Yes.

When you answered that question, did you know, did you understand that Mr. Iannuzzi was not asking you, "Did you see the man?" Did you understand

that?

THE WITNESS: Yes.

THE COURT: All right.

Go ahead, now.

MR. IANNUZZI: Thank you, sir.

BY MR. IANNUZZI:

Q And did you say that you saw an automobile?

A As I ran out there was one pulling away, yes.

Q What kind of automobile was it?

A I couldn't really tell. It's dark.

Q Well, did you tell the police on the very night, that very night, within hours of having seen it, that in fact it was a station wagon?

A It looked to be a station wagon, yes.

Q You told that to the police?

A Yes, I did.

Q You didn't tell them it was an Oldsmobile, did you?

A No, I didn't.

Q You tell them it was a yellow Maverick?

A No.

Q You didn't tell them it was a gold or yellow Oldsmobile that you had seen Grove Ebbert in, did you?

A No.

Q A station wagon?

A Looks to be a station wagon.

Q Yes?

A The way they --

Q Had you seen George or Grove or anybody come up to your house before on the 21st, the 22nd or the 23rd in a station wagon?

A No, I didn't.

MR. IANNUZZI: I don't have any further questions.

THE COURT: Redirect, Mr. Kimelman?

MR. KIMELMAN: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. KIMELMAN:

Q Now, Mr. McGhee, could you tell us again what the extent of your education is?

A Ninth grade.

Q And who ran the operation of the books and records for your trucking business?

A My common-law wife.

Q When you went to Gaines and you filled out that application, the first time, -- do you know what this is, 23 what?

THE CLERK: What's the date?

MR. KIMELMAN: No date.

MR. COHN: I have a copy.

MR. KIMELMAN: Okay. Thank you.

Q Defendant's Exhibit J, you recall Mr. Cohn talking to you about that?

A Yes.

Q This morning?

A Yes.

Q When you filled it out, was anybody else there?

A Joel Lichtenstein, William Cappiello.

Q Did Cappiello fill out an application at the same time? In your presence, if you recall?

A I don't recall.

Q Cappiello was the one that had brought you down to Gaines?

A Yes.

Q And he already knew Jack Schwartz and Joel Lichtenstein, is that right?

A Yes.

Q What were the circumstances, what happened after you filled out this application?

A Gave it to Joel Lichtenstein and they told

me I could pick up the check in a day or so or something like that. I can't remember.

Q And did you pick up the check in a day or so?

A Yes.

Q Now, this application has your name on it, doesn't it?

A Yes.

Q And it also has a Social Security number, doesn't it?

A Yes.

Q Is that your Social Security number?

A Yes, it is.

Q Also has the present address, does it not?

A Yes.

Q 31 Ontario Street, Huntington, is that it?

A Yes.

Q Was that your present address at the time?

A Yes.

Q It also said that there was a mortgage on that house, is that right?

A Yes.

Q Was there a mortgage on the house?

A Yes.

Q And if anybody had checked that information, all that information would have been correct?

THE COURT: Objection sustained.

Q It also had a business phone number on that application, didn't it?

A Yes.

Q Was that your business phone number?

A Yes.

Q And could you be reached at that number at that time?

A Now, also, yes. The same number.

Q And also had your home phone number and could you have been reached at your home phone number at that time?

A Yes.

Q Did you put your income on there?

A Yes.

Q What did you put as your income?

A Three hundred a week.

Q And that would be approximately how much a year?

THE COURT: It would be about $15,600?

THE WITNESS: Yes.

THE COURT: All right.

Go ahead.

Q Did you testify this morning that you had thought by this point in the year you had made about seven or eight thousand dollars, is that right?

A Yes, but I was -- could I say something?

Q Yes. Go ahead.

A I was confused between the business and my personal income when the question was asked.

Q How were you confused?

A I didn't know if he meant my personal income salary or the business income.

Q What income did you put down?

A My personal income. Three hundred a week. Salary.

THE COURT: Is DPG a corporation?

THE WITNESS: Yes.

(Continued on next page.)

Q Was $300 a week your personal income?

A Yes.

Q You indicated this morning, Mr. McGhee, that you thought it didn't matter about the information you put on that form; isn't that right?

A I was told it didn't.

Q And who told you that it didn't matter?

A William Cappiello.

Q Did he explain to you why it didn't matter?

MR. COHN: Your Honor, objection.

THE COURT: Overruled. I'll allow it.

MR. COHN: I'm sorry, was that Cappiello explaining to him why it didn't matter?

THE COURT: That's right. I'll allow it.

MR. COHN: I'll withdraw the objection.

A Yes.

Q What did Mr. Cappiello explain to you at the time?

A He told me they didn't do any checking. He said, "You come down with a serial number out of a junk yard, if you want. They don't check to see what kind of truck, check to see if the truck exists, check if they see if you got credit, no checking at all."

Q Based on his prior dealings with Gaines he said

this?

A Yes.

THE COURT: Again, this testimony is not for the truth of it as to whether they do or do not check. It's only to show why or an explanation as to why this witness filled out the application in the manner he did.

Q Did Cappiello sign -- strike it.

Did Cappiello sign every contract you ever entered into with Gaines as a guarantor?

A Yes, all but one, I believe.

Q Was it clear to you that he was guaranteeing your obligations?

A Yes.

Q Did you know that Cappiello was a personal friend of Jack Schwartz?

A At the present time, no.

THE COURT: When you say, "At the present time," do you mean then or do you mean now? You say, "At the present time," means today?

THE WITNESS: At that time.

THE COURT: Is that what you meant?

THE WITNESS: At that time.

THE COURT: At that time?

A At that time, no.

Q Do you know today that's a personal friend of Jack Schwartz?

A I don't know for sure.

Q You were also asked some questions about some bounced checks that went from you to Gaines. One was about the license and one was a monthly payment; is that right?

A Yes.

MR. COHN: Excuse me, your Honor, that is not the fact. There was nothing about a bounced check for a license.

THE COURT: You can take him on recross.

Q I'll show you what's been marked as Government Exhibit 23H (handing to witness) for $820 and Government Exhibit 23G (handing to witness) for $720; is that right?

THE COURT: If you intend to answer the question, I'm sure the jury didn't hear it because I didn't.

A One is 820 and the other is 722.

Q What were those payments for?

A License plate is 820 and I believe the 722 is the payment.

Q These checks, the actual checks here, these didn't come from your records as they are in the form today, are they?

A No.

Q These are from Gaines' records; is that correct?

A Yes.

Q So the bank didn't return these bounced checks to you, did they?

A No, they didn't.

Q So you never saw these bounced checks, did you?

A No, I haven't.

THE COURT: When they were unpaid you got notice of it, didn't you, from the bank?

THE WITNESS: I believe I did, your Honor.

Q You had a conversation with Jack Schwartz on May 2nd at his office; isn't that right?

A Yes.

Q In that conversation Mr. Cohn asked you this morning whether you were pleased with the arrangements that were made?

A Yes.

Q Could you explain how you felt when Mr. Schwartz told you that he would guarantee these fellows wouldn't come back to your house?

A I felt somewhat relieved of the pressure knowing they wouldn't be back for the same reason that they came before.

Q Did you believe that Mr. Schwartz could guarantee that these fellows wouldn't come back to your house?

A Yes, I do.

THE COURT: That answer does not establish a relationship between Grove Ebbert or anyone else that appeared at Mr. McGhee's house.

Again, it attempts to show by what this witness is testifying to, as to how he felt because part of the crime charged involves instilling fear into the alleged victim. So, his reaction, how he felt, his state of mind is in issue. That's why I'm allowing it.

Q When you said to Mr. Schwartz, "Maybe you can have one of the girls or somebody give me something in writing, you know, to that effect, or in case these guys does happen to slip by," and Mr. Schwartz replied, "Nobody is going to slip by anyplace," did you understand in your own mind that he could guarantee that nobody would come back?

A Yes.

Q When you said to Mr. Schwartz, "All I'm concerned about is that he knows about this agreement between you and I. You know, Grove and this other Spanish guy or whatever he knows that this," and Jack Schwartz said, "He knows," and you said, "He knows?" And Jack Schwartz said,

"Yep, he knows. We made an agreement. I expect you to pay me."

Did you understand that to mean the Spanish guy knew of this agreement?

A Yes.

Q When these two men came to your door the first night and you heard a voice with a Spanish accent say, "Jack Schwartz," you knew it wasn't Jack Schwartz at the door; isn't that right?

A Yes, I did.

Q You didn't attempt to convey to this jury that it was Jack Schwartz at the door?

A No.

Q You never heard that voice before?

A No, I haven't.

Q When the men came back to your house the next day, did you recognize the same Spanish accent, the same voice as being the voice that you heard the night before?

A Yes.

Q Isn't that in fact how you reached your conclusion in your mind that it was the same man?

MR. IANNUZZI: Objection.

THE COURT: Objection sustained.

Q Mr. McGhee, is it your practice to have visitors

come to your door at midnight?

A No, it isn't.

Q When somebody rang your door at midnight, and said they were from Gaines Leasing, were you concerned about it?

A Yes, I was.

Q Did you know why they would come from Gaines Leasing at midnight to see you?

A No, I don't, not really.

Q When you made, as Mr. Iannuzzi indicated, several statements to both the police and to the United States Attorney's office and to the Federal Grand Jury, isn't that correct?

A Yes.

Q And the first statement that you made to these police was on the night that your garage burned?

A Yes.

Q Were you say that you were in an excited condition when the police came after your garage had just burned down with your car in it?

A Very excited.

MR. IANNUZZI: Objection, sir.

THE COURT: Overruled.

MR. IANNUZZI: May I make an objection to the

District Attorney leading his own witness despite the fact that this is redirect examination?

THE COURT: Overruled on the grounds stated. I'll allow it.

Q Were you in fact upset when you talked to the police?

A Yes, I was very upset.

THE COURT: How soon after you learned this happened were you interviewed by the police? Was it hours?

THE WITNESS: This happened around 10. They kept me until about four o'clock in the morning.

Q So, you were up until four o'clock that morning, that night, talking to the police, giving statements; is that correct?

A Yes.

Q And the first statement that you gave to the police on the night that the house burned down --

MR. IANNUZZI: Objection, the house didn't burn down.

MR. KIMELMAN: Excuse me, the garage. I apologize.

THE COURT: I don't know that the garage burned down.

At least there was a fire in the garage, right?

THE WITNESS: Yes.

THE COURT: I think we'll take a short recess at this point, about a 10 minute recess.

I don't want the lawyers to leave yet. The jury is excused.

(Jury leaves courtroom.)

THE COURT: I want to know how you intend to use those statements, Mr. Kimelman.

MR. KIMELMAN: There are prior inconsistent statements made by the witness in contradiction to the apparent inconsistent statements brought out by Mr. Iannuzzi during his cross-examination.

THE COURT: Not every challenge to credibility is a charge of recent fabrication and the mere fact that the defendant's lawyers point out inconsistencies does not give you the right to show that he made another statement.

As a matter of fact, most of the errors is that I see are just errors. For description, for example, "I," instead of "we," "Gaines," instead of "Jack Schwartz. I'm not going to allow you to just show at a previous time he made a statement that was inconsistent.

As a matter of fact, he could not have made a statement prior to the time they made the statement

to the police from the time of the fire to four a.m.

MR. KIMELMAN: I understand, Judge. He made a statement the night of the fire. He made a second statement the day after.

THE COURT: I know.

MR. KIMELMAN: There can certainly be inconsistencies between those statements.

THE COURT: That's right, but they're inconsistencies and, incidentally, the defendant's counsel is not obligated to introduce a whole statement because the defendant picks out part of it that is inconsistent. That would just discourage any kind of cross-examination.

MR. KIMELMAN: I was askihg him if he wanted to introduce.

THE COURT: You announced it in open court. That I won't allow.

What you're really saying to the jury, "Here, Judge, here's his statement and its consistent with his testimony." That's what you're really saying when you're saying, "I'm offering this statement."

There's one area that I will allow use of that statement. If the statement didn't fairly disclose the entire thought, then I'll allow it, allow you to

read the whole thing, including the portion that was previously read.

The other is if in that same statement if it modifies or corrects what was previously said.

For example, and I don't say it happened, but in the Grand Jury, if he said -- and this is the kind -- he said, "You said they both came to the door. Now you're saying that just Sarkis came to the door." I don't whether that's inconsistent, but the fact is that if anyplace in the statement it says, "Well, Sarkis first came to the door and then he was joined and said --" that would explain it and that wouldn't be a full reading of the thought, but I will not allow you to read unrelated matters into the record merely because they point out inconsistencies.

MR. KIMELMAN: Your Honor, what the problem is here is that Mr. Iannuzzi was suggesting to the jury by his questions that the defendant is making a recent fabrication by testifying as to something today in this courtroom before these ladies and gentlemen which wasn't in a statement --

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THE COUR. Only one area he did that, when he said only last week with Mr. Kimelman, in other words, the lawyer may have given him the idea for some strange reason, and he said something that he told you something. I forget what it was.

MR. COHN: The picture.

THE COURT: Oh, the picture.

MR. IANNUZZI: That's all that happened last week was the picture.

THE COURT: I don't know -- No, I thought there was something else. The picture, of course, was an indication he couldn't pick out Sarkis.

Why wasn't the spread brought? Why didn't you use the spread, Mr. Iannuzzi?

MR. IANNUZZI: I have a difficult-- It's mug shots. I was standing on my feet -- whether you should put mug shots or cut them in half. That's why I didn't use them.

THE COURT: You certainly could have shown the pictures he did pick out.

MR. IANNUZZI: I could have.

THE COURT: I don't care.

MR. COHN: On a question of procedure to keep things moving, Mr. Kimelman told us his next two

witnesses are Jack Cohen, the fellow who brought George in from Puerto Rico, and Grove Ebert. He tells, I understand from his colleagues, there's very little 3500 on Jack Cohen, but there is substantial 3500 on Grove Ebert.

I was going to suggest this: If we're not going to need time after Grove Ebert, I was going to suggest if it doesn't interrupt Mr. Kimelman, if he put Jack Cohen and Ebert, that would be bringing us to the end of the day, I assume, and we can work on the Ebert material overnight.

THE COURT: If he gives it.

MR. COHEN: Close of direct? If he doesn't, we'll take a three-hour recess tomorrow. He won't do that to you, I'm sure.

THE COURT: He'll do it to me.

MR. COHN: He will?

THE COURT: Of course. There's nothing I'll do about it. I don't think I have the right to do it. I do not second-guess the United States Attorney, and there would be nothing personal if he turns it down. I can't make these personal, even though I hate what Mr. Iannuzzi does during the trial. As soon as the trial is over, the day is over, I've forgotten it.

MR. IANNUZZI: Might I address myself--

THE COURT: We have more lawyers here than Mr. Iannuzzi, you know.

MR. COHN: We're all trapped, trying to get out of here. I'm making a suggestion to save us a half day's time.

THE COURT: Instead of asking, "Was it a Chevrolet? Was it a Cadillac? You're sure it was a station wagon?"

MR. COHN: I don't ask that.

THE COURT: I'm not directing it to you. Those are the hundred questions that are asked where one would do. I sit here and take it and sometimes grin and bear it.

MR. COHN: All I'm asking, if we don't have it, maybe Mr. Kimelman intends to do it anyway. All I'm saying, I don't feel like walking in at ten, have a witness finish at 10:30, ask you for three hours.

THE COURT: Believe me I would love him to do it.

Incidentally, Mr. Grove Ebert pleaded before me and I think I asked him his version of what happened and his role in it. Didn't I do that?

MR. KIMELMAN: Yes.

MR. ROSEN: I was going to ask the Court, that elocution--

THE COURT: Pay for it and they'll give it to you.

MR. ROSEN: The Clerk could bring it up.

MR. COHN: I'm giving you a memo on your powers as Chief Judge, which you don't know about.

THE COURT: I wish you would. The Law Journal asked me what my powers are. They wanted to write an article. I said none. I make coffee in the morning, take the complaints of the judges, the abuse, and that's what Chief Judge is.

MR. IANNUZZI: Might I suggest what you do does not involve you personally--

THE COURT: I used to be a very patient man, Mr. Iannuzzi.

MR. IANNUZZI: You know you and I get along, there's nothing personal that I do--

THE COURT: I don't remember.

MR. IANNUZZI: In any event, I don't do these things personally, I'm trying a case.

THE COURT: Incidentally, I believe that. I believe that's your style. There's no question.

MR. IANNUZZI: You may not approve of it very much.

THE COURT: It may be a good style. I'm not saying that, but for me, it wastes time and I don't like to crimp anybody's style.

You see Mr. Kimelman, walking back and forth, I have a fellow represented Morton, he came in late, wanted an adjournment, and I wouldn't give it to him. I'm not exaggerating, he never sat down during the trial and finally it drove me crazy. I said, "Now, look, I don't mind you walking a little, getting some exercise, shaking this stuff out, but I can't keep my mind on the case."

He told me that he had a bad back or something and he had to do it.

Mr. Kimelman, I thought of him when I saw Mr. Kimelman. That's his style.

All right, some judges say, "Stay at that lectern," but I don't think that's fair. There's something in someone's personal habits that crimps his examination if he's limited. So, the same with you. But, for example, when you say, "Now, look," to me, that was a tricky question. "Did you see him? Do you know who did it?"

In my opinion he knew who did it but he didn't understand what you were asking.

When I ask a question, and I haven't asked

too many in the trial, I want to make sure when he answered he knew the question was "Do you know, really know," not "Did you see?" He happened to give you the right answer to my question.

MR. IANNUZZI: You did it well, clarified it, and he substantiated the fact.

THE COURT: You didn't give me a chance to finish the question.

MR. IANNUZZI: I didn't mean that. I apologized. I sat down.

THE COURT: Only because I was ready to bring the Marshals up.

MR. COHN: Mr. Rosen and I would provide balance by being models of decorum.

THE COURT: You surprise me. I expected everything from you. I thought I would have problems, but obviously you do what you know you have to do.

MR. IANNUZZI: If you got gunned up for that don't take it out on me.

THE COURT: That's a different style, that's all.

(Recess.)

(The witness resumed the stand.)

THE COURT: Seat the jury, please.

(The jury enters the jury box.)

REDIRECT EXAMINATION

BY MR. KIMELMAN (Continued):

THE COURT: We're ready, Mr. Kimelman. You may proceed.

MR. KIMELMAN: Thank you, your Honor.

Q In your statement to the Suffolk County Police, the night of the fire, there are some questions asked of you about whether you said the man who came to the door said they were from Gaines Leasing; is that correct?

A Yes.

Q Did they say they were from Gains Leasing?

A Yes, they did.

Q So what is written on the statement here that they said they were from Gains Leasing is correct; is that right?

A Yes, it is.

Q What is not on this statement, however, is the fact that the man with the Spanish accent also said--

THE COURT: Objection sustained.

MR. COHN: Objection, your Honor.

Q Is everything that the man said when he came to the door on this statement?

A No.

Q What is on the statement is correct, isn't it?

A Yes.

Q Is it on this statement what the men were wearing or how they came?

A Yes, it is.

Q We're now talking, again, when you finally saw the men.

A (No response)

Q Do you understand me?

A No, I don't.

Q When the statement talks about the men coming back the next day, when you actually saw them, did you tell the police what they were wearing?

A Yes, I did.

Q On the statement that you made to the police the next day, not the night of the fire but the next day, you told them, the detective, what the men were wearing when they came, isn't that right?

A Yes.

Q I ask you to look at that statement, the statement of the 24th (handing). Does that appear anywhere on the statement, what the men were wearing?

A (No response)

Q You don't see it on that statement?

THE COURT: Louder, please.

A Can't seem to find it.

THE COURT: All right.

Q You had a conversation with the individual with the Spanish accent when he came to the door first; isn't that right?

A Yes.

Q Mr. Iannuzzi went through some questions with you about whether the guy physically harmed you in any way; is that right?

A Yes.

Q And you testified that he didn't touch you; is that right?

A Yes.

Q And you also testified that he made no threatening gestures towards you; is that right?

A Yes.

Q But he did say something to you, didn't he?

A Yes, he did.

Q Could you tell us, once again, what he said to you about not wanting to hurt you, could you give us the full statement that he said?

A Yes, as far as I can remember he told me that he didn't want any trouble. He had a job to do. He worked for Gaines Leasing and he had to go back with something, that Jack was his boss and "we don't want to hurt you."

Q Now--

MR. KIMELMAN: I'm sorry, your Honor, did you want to ask something?

THE COURT: No.

Q Did you understand in your own mind, Mr. McGhee, at that time that if you didn't comply with what he was asking that you would be hurt?

A Yes.

Q Was there any doubt in your mind that you would be hurt if you didn't comply?

MR. IANNUZZI: Objection.

THE COURT: Overruled. I'll allow it. Normally, the alleged victim or witness is not permitted to testify as to what his interpretation is as to what the other individual said, but in this case, because the state of mind, as we call it, of the alleged victim is in issue, then how it registered with the alleged victim is an element of the crime. I'll allow it on that issue.

Q Mr. McGhee, when you went down to Gaines Leasing to see Jack Schwartz, you said you were afraid; is that right?

A Yes, I was.

Q You said that even though the police were outside, you were still afraid because you knew what Jack Schwartz had done; is that right?

A Yes.

Q Have you ever seen Jack Schwartz with a gun?

A Yes, I have.

Q Would you tell us when and where you had seen Jack Schwartz with a gun?

A In his office. I tried to put it on the tape, but apparently it didn't come through, but I told Detective Brown--

THE COURT: Out "I told Detective Brown."

Q Where did you see the gun in his office?

A On his body.

Q Where on his body did you see the gun?

A On the left side, in a holster.

Q Did that place you in fear, seeing Jack Schwartz with a gun?

A Yes, being alone.

MR. KIMELMAN: I have no further questions.

THE COURT: Mr. Cohn.

RECROSS EXAMINATION

BY MR. COHN:

Q You were afraid to go up to Gaines Leasing on May 2nd, 1975 because you knew Jack Schwartz carried a gun; is that right?

A Yes.

Q You were still afraid even though you brought policemen to go with you; is that right?

A Yes.

Q Because you were going in the office; is that so?

A Yes.

Q And that was the reason for the tape and all these other things you told us about?

A Yes.

Q Couldn't you have called Mr. Schwartz on the telephone?

A He wouldn't talk to me on the phone.

Q Did you try to get him on the phone?

A Yes, I did.

Q When?

A I believe it was that day before I went down, I tried to talk to him on the phone.

Q On May the 1st?

A Whatever day I went down. I think it was the 2nd.

Q Did you ever state in any of your prior testimony to the grand jury or in any statement you made that you tried to reach Jack Schwartz on the telephone on May the 1st and could not do so?

A I don't recall, sir.

Q You know very well you never did, don't you?

A I don't recall, sir.

Q Well, let's take a minute.

MR. KIMELMAN: Your Honor, this time the Government will concede that question was never asked and never answered in the grand jury minutes.

Q Mr. McGhee, would you just tell us forthrightly, isn't it a fact that never before did you tell, did you say in any statement you made relating the events of May the 2nd, this entire case, did you ever before say that you tried to get Jack Schwartz on the telephone on or about May 1st, and he wouldn't take your call?

A I don't recall, sir.

Q You don't recall?

A No.

Q By the way, when Mr. Kimelman was asking you

about the credit application he pointed out to you and you confirmed -- you said you had been confused by some of my questions because you didn't know whether they referred to the corporate earnings or your personal income; do you recall that?

A Yes, I do.

Q Then you told Mr. Kimelman that your personal income was $300 a week; is that right?

A Yes.

Q And would it be correct to say that $300 a week was paid to you by your corporation, D.F.G.?

A Yes.

Q Was paid each and every week?

A Excuse me.

Q That was paid each week?

A Yes, about each week that I would take it out.

Q Did you take it out each week?

A No, I didn't.

Q You didn't take it out each week?

A No, I didn't.

Q You put it on your application, your share was $300 a week?

A Yes.

Q How often did you take it out and how often

did you not take it out?

A I can't answer that question, sir.

Q You don't know?

A (No response)

Q You didn't give priority to your creditors for the $300 each week?

A Yes, I did--

Q Well, you were riding around in a Cadillac which you were sticking GMAC?

A Not sticking.

Q Well, you were behind what you had agreed to pay to GMAC for a nice Cadillac car you were driving around, weren't you?

A Behind one payment.

Q You were behind in your payments to GMAC.

MR. KIMELMAN: What time, your Honor?

Q Take any time. Were you ever current?

THE COURT: Aren't we talking about the time of the application?

MR. COHN: I'll be glad to take the time of the application.

Q You testified this morning that you were behind one or more installments on your GMAC application, didn't you?

A One, I believe I said.

Q I asked you could it be more, namely, three, and you said that you thought it was one, could possibly be more. That's my recollection. The fact is, you were behind, weren't you?

A Yes, I believe still one.

Q You were behind in your house mortgage that month, weren't you?

A No.

Q You weren't behind in your house mortgage that month?

A No.

Q Were you behind in your payments to Associated?

A They had their equipment back.

(Continued on the next page.)

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RECROSS EXAMINATION

BY MR. COHN (Continued:)

Q Associated had the equipment back?

A Yes.

Q They didn't take the Brockway Equipment back until the next year, January 31st, 1975. We're talking about May '74.

A I'm sorry.

Q Mr. McGhee, finally, it's your testimony to this jury when Mr. Capiello told you they didn't check out the items on these credit applications, despite the fact you certified to the truth of the statements therein because you were told they really didn't check out the items, you felt you could put down anything and tell any kind of a lie you wanted?

A No.

Q It's just an honest application?

A Just an honest application.

Q Just like your testimony here.

THE COURT: Objection sustained.

MR. COHN: I have nothing further, your Honor.

RECROSS EXAMINATION

BY MR. IANNUZZI:

Q Mr. McGhee, Mr. Kimelman asked you whether or not on the evening of April 23rd, 1975 when you spoke to the police, whether or not you were excited, in a state of excitement and nervousness as a result of what occurred in your home, you indicated you had been nervous and excited when you told the police various things; is that correct?

A Yes.

Q You also indicated as a result thereof you hadn't told the police about how these -- these men were dressed.

A Right. I couldn't recall that.

Q You don't recall you just said that to Mr. Kimelman?

A I just told him how they were dressed. I couldn't remember if I told the police on the night of the 23rd how they were dressed.

Q You didn't tell them the next day how the man was dressed either, is that right?

A I told them how, but I don't remember exactly when or where. It's in the statement.

Q Is it as a result of your excitement on the evening that perhaps you may have left certain things out or you didn't tell them everything?

A Possibility.

Q How long did this excitement, nervousness that you were experiencing on that night, how long did it last, a week, a month?

A It's still going on.

Q In August of 1975 you spoke to Mr. McMullin, I believe August the seventh.

Do you remember testifying to that? He came to your house?

A Yes.

Q He showed you the statements that you gave to the police, do you remember that?

A Yes.

Q You remember you told him those statements were true and accurate, to the best of your recollection?

A Yes.

Q Were you still as upset in August as you were the night of the fire?

A Yes.

Q Would your testimony now be that all of the statements you made, both to the police and McMullin, were inaccurate because of this excitement?

A No.

Q In August of 1973 did you tell Mr. McMullin

how they were dressed?

A I believe so.

Q I show you a document, 3500 material. Does it appear in the August statement?

A I don't see it here. I don't believe I stated it here.

Q There was now four months later when you saw Mr. McMullin?

A According to this it's 8/13.

Q What is this date?

A 8/7.

Q August 7th?

A Yes.

Q Do you recall in addition you spoke to Mr. Kimelman in October, the 23rd, almost three months, almost November you remember that?

A Yes.

Q I will show you this statement and see if what Mr. Kimelman said was not on the police statements, and now you have testified it isn't on Mr. McMullin's statement. See if it's on the statement you gave Kimelman some six or seven months later.

A I don't believe I stated it here either. Not really closely, but it's on this one.

Q That's one of the statements you gave to the police you just testified to Mr. Kimelman it's not there.

A This is April the 23rd.

Q The same night that it happened.

MR. KIMELMAN: I asked him about April 24th, your Honor.

A Does it appear thereon?

A Excuse me?

Q On that statement that you're talking about, which is the 23rd, then, where you say it appears there, something about the clothing of the person, does it appear thereon, would it be your testimony that that statement therefore is the more complete statement?

A Yes, sir, April 22nd.

Q That's a more complete statement?

A Yes.

Q And does it appear thereon, on the bottom of the second page, does it appear that a man with a Spanish accent spoke to you on the 21st, April 21st, starting with April 21st, the end of the paragraph?

A This is the time they came at midnight.

Q Yes, it doesn't say anything about the Spanish accent that you testified here in court, that statement you say is more complete?

A Yes.

Q It says that, does it say a man with a Spanish accent came to your house at midnight on April 21st?

A Yes.

Q Does this statement say the following -- did you tell the police "April 21st, 1975 at or about twelve midnight, two men came to my home and asked to see me. My wife answered the door and told him I wasn't at home.

"They said they were from Gaines Leasing Company and they had a yellow Maverick. They told her they would be back Thursday."

Does that say anything about a Spanish accent?

A No, it doesn't. You asked that question before.

Q And it's the same accent?

A Yes.

Q You didn't see Mr. Sarkis with a gun?

A No. He had an overcoat on. I couldn't see through it.

Q You didn't see a gun, did you?

A No.

Q He never showed you a gun?

A No.

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Recross-McGhee-Iznnuzzi

Q He didn't show you any weapon?

A No, he didn't.

Q He only said the things to you that you have testified to?

A Yes.

THE COURT: Yes, anything further?

MR. KIMELMAN: I do have some questions.

REDIRECT EXAMINATION

BY MR. KIMELMAN:

Q When you filled out that application with Gaines did you intend to defraud Gaines at the time you filled out the application?

A No, I didn't.

Q You gave them a tractor?

A I put up a tractor as collateral.

Q They got the title to that tractor?

A Yes, the papers.

Q Did they own the tractor?

A It was registered under their name, transferred from me to them.

Q Did you enter into a further transaction with Gaines when you signed, you and De Lorenz signed a mortgage?

A Yes.

Q Was that on a house she owned?

A Yes.

Q Where is that house located?

A Huntington Station.

MR. COHN: I question whether it's proper redirect.

THE COURT: I don't understand that it's proper redirect.

MR. KIMELMAN: I beg the Court's indulgence.

THE COURT: Go ahead.

Q The mortgage was on a house located where?

A Huntington Station, Long Island.

Q Is that the house where the garage was burned?

A No.

Q Where you were residing?

A. No.

MR. KIMELMAN: No further questions.

RECROSS EXAMINATION

BY MR. COHN:

Q This tractor that Mr. Timelman just asked you that you gave Gaines for collateral, that's why you say you didn't have to worry what the application was that you didn't intend to defraud them.

A True.

Q That's the same one you left at a service

station in New Jersey and didn't tell Gaines that you left it there?

A Yes.

MR. COHN: Nothing further.

MR. IANNUZZI: Nothing further.

MR. KIMELMAN: I have nothing further.

THE COURT: Next witness.

MR. KIMELMAN: May we ask for a brief recess while we get the witness to distribute some material?

THE COURT: All right. Is five minutes enough?

MR. KIMELMAN: Five minutes is enough.

(The Jury withdrew from the Courtroom at 4:11 P.M.)

MR. KIMELMAN: Statement, original statement F. Grove Ebbert, 7/11/75.

THE CLERK: So marked Government's Exhibit 3500-15.

XXXXX

(So marked.)

MR. KIMELMAN: Arrest record of Grove Ebbert.

THE CLERK: So marked Government's Exhibit 3500-11.

XXXXXXX

MR. KIMELMAN: FBI report, consiting of

MR. COHN: Your Honor, I just want to make a brief motion in connection with the -- I didn't want to do it in front of the jury --in connection with Mr. Kimelman's Mafia business, and of course, the cross-examination.

THE COURT: Yes, that bothered me when Iheard it.

MR. COHN: It did?

THE COURT: It is the first thing that came out. Now of course there was a way of examining him on that as to what he meant.

MR. KIMELMAN: The witness was obviously being evasive and --

THE COURT: I understand that and maybe, maybe it is not reversible error in this case, but my reaction was, My God, after all, after two weeks, is this going down the drain because of the question like that, a meaningless thing like that?

MR. KIMELMAN: Your Honor, I think --

THECOURT: I don't know why. Well, I think that an assistant that does that at least without checking with the Court is like a bull in a china closet. You don't care, you are just going to ask the question that you think is going to have an affect.

MR. KIMELMAN: Your Honor, the Court knows that throughout this trial I have constantly asked for side bars and the jury being excused to go over ques-

tions with the Court and to make offers of proof, and that I have been attempting to try this case as clean as I can without deliberately trying to put in material that Idon't believe should be put in.

THE COURT: Have I ever turned you down when you ask for a side bar?

MR. KIMELMAN: Of course not.

THE COURT: So why in this case --

MR. KIMELMAN: Your Honor, Your Honor, when a man on the tape says he is "connected" you can almost take judicial notice that when some body says you are "connected," that it means that they are connected with the Mafia.

THE COURT: Mr. Kimelman, I read the question very carefully and it is only because I feel that he couldn't have meant anything else that I thought it might get by and that is about how Ifeel about it.

If there is a conviction, it is a point that you will have to defend very vigorously because I can tell you very frankly that I questioned the appropriateness of it.

I doubt in the context in which the question was asked that it was prejudicial, and I am going to deny it, and again, I feel constrained to do it, but I had thought if that had happened at the outset I

may very well have declared a mistrial.

MR. KIMELMAN: I will tell the court when I ask the question that I ask it in good faith and not based on any wild interpretation of what those words might have meant.

THE COURT: I might say in support of the Government's position that it was very difficult to elicit any information from this witness, he was reluctant to give answers. The question of his credibility is before the jury and for these purposes I can tell you that I find that he committed perjury -- I am not recommending that the case go before a Grand Jury because there is a certain amount of perjury that we all tolerate in this Court, unfortunately, and in every Court, and it came within the tolerable limits.

When he said he didn't know what he meant by "muscles," that he didn't know any of the meanings, and now we are not talking about the testimony saying he lied when he told Taylor this, and that I won't pass comment on because that is obvious as saying, "I didn't know what I meant when I said 'muscles,'" so following that outcome when he said he was "connected," and he was, "connected" with Italians -- I mean I am even reluctant to use the slang and I don't like it, but he himself used it and "fellows come from Brooklyn,"

and he was saying, "boy, this is a part of what is called the Mafia," and I might say for the record that I happen to be one of those judges that question very seriously the existence of Organized Crime that also often picked upon by the Prosecution, the United States Attorneys and others, but in my opinion, he meant one thing. Now whether he was telling the truth or not, he certainly meant to tell Mr. Taylor that Mr. Schwartz is "connected" with Mafia.

Now, I put no stock in it, I am not saying that because Ibelieve in the truth of it, but there was no question in my mind that that is what he was trying to tell Taylor. That is the only reason I think which --

MR. KIMELMAN: Your Honor,I would also like to say that although this is not turning out to be my day since I have been accused twice today, but this morning although I agree with the Court that I misspoke and I should have asked for a side bar, I still believe to this minute that this witness was admitting committing a violation of 894.

THE COURT: Well, after listening to him I am constrained to agree with you.

MR. KIMELMAN: That was my concern, that is why he should have been advised of counsel before he admitted under oath --

THE COURT: I might have taken it out of the hearing of the jury.

MR. KIMELMAN: I apologize.

THE COURT: I might have prodded him into agreeing that he meant some important criminal figures or people that used strong arm tactics or something like that.

I think it is unfortunate.. I don't really think in this context that it is prejudicial, though it may if there is no reason for it, and if some body, a Prosecutor, asks, A are you connected with the Mafia? Well, that is it. I don't think the case should be tried on this emotional basis.

MR. COHN: Judge, I appreciate that as well as your fairness in dealing with all of these issues, and all through this case here, there have been problems.

Now, let us assume everything that is said is correct, and of course I don't accept it with reference to this witness, and I am not going to put a halo on any one, on Taylor or McGhee, they are three bums, and I don't thinkthere's any question about it, if you were to have a contest among those three, I don't know who would win or lose, I am not glorifying him. But I think Your Honor is probably a little bit severe on it because, you know, particularly when you are being taped and then you have a conversation read back to you a year

later and you are asked what you meant by this word, this sentence, well, some things mean nothing. It is a type of question which I find -- well, in my career as a testifier I have always found great difficulty with question, What did you mean, and it just isn't that simple.

I think Your Honor is probably beinga little bit tough on this fellow and holding him to some standards of what you think and how you think he should have responded when you get down to this "connection" thing.

THE COURT: I really don't mean that, Mr. Cohn, I don't know, I am not naive on these things, but there are expressions which I don't know or understand, "put the arm on." As I indicated that came in another case and I couldn't understand what he meant by it in this case. "Put the arm on them" meant, "to take a bribe," I learned that.

When I saw it here I can see where, "put the arm" also could mean to try to collect the money. I never heard it before where "put the arm on" meant using coersion or using extortionate means.

MR. COHN: Your Honor, let me say this, I was just shown this by my guys, some one called me, I got a note which says that they just want to put the arm on us to take tickets for next week --

THE COURT: But muscle has such a definite meaning, I never heard it used any other way, and when he said he didn't know what it meant.

MR. COHN: I think at one point what he was trying to say and as Iunderstood him to be trying to say and that was that Taylor had told him that these guys had been around, and so on and so forth, and he was saying that he would call that muscle, in other words verbalizing it in one word, and he is not an honor graduate of Harvard.

Now, putting together what Taylor told him about two guys coming around to his house, and so forth, and so on, his interpretation of that was putting the muscle on and it is as what Your Honor has said --

THE COURT: To me muscle means using physical force to do something.

MR. COHN: We all use the term muscle, some times in different ways, muscles certainly can mean physical force, that is what a muscle is, it can also mean mental force, it really can.

THE COURT: I have never heard it used that way.

MR. ROSEN: This is perhaps out of context but in this case Taylor said that nobody had touched him, they had merely smiled at him.

THE COURT: The muscle man were around, he didn

say that he was assaulted, he said the muscle man were around and these were the people that were to show physical force.

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MR. COHN: Also I can say, You have a lot of muscle, you are the Chief Judge, and so on, so you have a lot of muscle.

THE COURT: Really?

MR. COHN: Absolutely.

MR. IANNUZZI: You have a lot of clout.

MR. COHN: Power, influence, clout, the head of such and such a political party has a lot of muscle.

THE COURT: He should have said it, he should have said so.

MR. COHN: I agree with you.

MR. IANNUZZI: That is right.

MR. COHN: Here is the problem we have, and honestly, one final problem, and I think your Honor put it on the record very fairly, but unfortunately this word Mafia with the organized crime section, which is all front page publicity, and it is a very very dismal thing, and as to Mr. Schwartz, I don't think the Mafia has to be -- and I fight against any kind of ethnic labels -- and Mr. Schwartz is not in the Mafia, and has never been in the Mafia and does not have Mafia connections.

I would think from the Government's own theory that Mr. Jack Schwartz couldn't get anybody from the Bronx but had to get somebody down from 2,000

miles, from Puerto Rico, and if Mr. Schwartz was such a big deal with the Brooklyn or New York Mafia or something he could have exerted power and gotten one of the 28,000 members to go around to see Freddie McGhee for one day.

This certainly isn't their theory that Jack Schwartz is a Mafia man or is Mafia connected.

So when you put in front of this jury, with all the other implications, and when you just slap it to them cold and say Mafia -- don't forget, Mr. Kimelman was to an extent exposing the theory that Mignoli was not lying at all but he was telling Taylor what he really believed that Schwartz is the kind of guy, and when you get that, and that certainly was the implication --

THE COURT: If you notice, I made no mention of it because I thought that would underscore the point.

MR. COHN: That is not my complaint.

THE COURT: Before that I charged that what Mignoli told Taylor should not be considered the truth at all.

Now I will say it again in general terms if you feel I should.

Now there is no question about it this should

be preserved and it may very well be an important point for you to argue if there is a conviction.

MR. COHN: One more thing, your Honor, I know you have denied the motion but would you think about it again between now and Monday.

THE COURT: I will think about it, Mr. Cohn, I will think about it but I will tell you it probably be the prudent thing for me to say -- and I am going to think about it -- that I don't think there is a possibility that I will change my mind about it.

I tried to look, well, pleasant and calm when it happened.

MR. COHN: I looked up at you and I could see.

THE COURT: I was thinking, My God.

Judge Friendly once said in a case in which he spent about three pages affirming the opinion and then for about fifteen or twenty pages he wrote a treatise on why prosecutors bring in collateral matters. He said the proof of overwhelming and look at the collateral matters that the prosecutor brought in. Why do they do that, why do they risk a guilty verdict because they like to make it a little more solid or possibly like to be dramatic -- and I don't say you did it for that reason but sometimes I wonder.

I should have Judge Friendly's opinion in front

of me and cite it. I had it out here for about a month, I wanted the prosecutors to be informed.

Now will you please read that opinion by Judge Friendly?

It was so much in point.

Believe me, if I had been advised before the question was asked I would have preferred going over it outside the hearing of the jury and I would have permitted hot pursuit of the answer and I would have told them in no uncertain language that he might very well be held for contempt or for committing perjury because he said he didn't know, and we would see if that would have brought out the answer from him.

MR. IANNUZZI: Your Honor, may I be heard in reference to this?

THE COURT: Sure.

Incidentally, I have two pleas that I am going to take --

MR. IANNUZZI: I won't be lengthy.

Your Honor, I just want to suggest that your Honor's connotation I believe is somewhat unrealistic, most respectfully, because when you suggested in the context of how this occurred, the question of who is Jack connected with and that it is no significance in reference to the jury, then I just suggest that in

this tape --

THE COURT: No, you misunderstood what I am saying.

If there were no basis for it in this transcript I would have declared a mistrial, but there is a basis for it.

MR. IANNUZZI: May I suggest that the basis was a suggestion by Jack Taylor and that it was not by the witness, he was the one who suggested who Jack Schwartz was connected with and then Mr. Mignoli says "Yeah," and then Mr. Taylor repeats, Who is Jack connected with, so Mignoli says he is connected with -- and then you have that language, guineas, and then suddenly Mr. Mignoli suggests not that it is even organized crime, and he doesn't use the word Mafia, and I suggest --

THE COURT: One is as bad as the other.

MR. IANNUZZI: I think it is worse because it is an attempt to show the Italian aspect of it and it is also in connection with a statement -- well, it all goes to the point and purpose that those people who are of Italian extraction and who Mr. Schwartz knows, they are in fact in organized crime.

(Continued next page.)

THE COURT: Mr. Iannuzzi, I do not need any support for the ruling I made. You are putting on the record the very reason I am saying it is suggested. He did not say any organized crime, he said, "Fuckin guineas".

MR. IANNUZZI: If Your Honor please, I take great umbrage with reference to Italians. I suggest of the 23 million Italians in this Country they are not all members of the Mafia. For this United States Attorney to suggest it is and for you and our esoteric sophisticated to say you know what it means, but the jury knows what it means and by using that it creates a completely different picture than you and I in our sophisticated way we come across this all the time.

THE COURT: Since you have made a patriotic speech,

MR. IANNUZZI: It's a factual speech that has nothing to do with my being an Italian.

THE COURT: I would like to put on the record in my recollection I have never used the name Mafia except to explain something like this. I have never said some one is a member of a Mafia. When my reports come to me and lawyers say or the probation report indicates it and the lawyer complains about it, I put the United States attorney to its proof and they have withdrawn

the statement in almost every instance and so I will not stand for it, If I can help it. But what you said stripping away the beautifulspeech about twenty three million Italians, and you know what I say some of my best friends are Italians, you want me to say it.

MR. IANNUZZI: If you wish some of my best friends are Jewish.

THE COURT: I am one of those who suggest that some of our Jewish organizations should take hold of this problem and I believe in the distress and anger of Italians.

MR. IANNUZZI: I am not suggesting distress or anger.

THE COURT: Now that I have put my personal position on the record, let me say what I meant.

If all this was not in the record, if there was no basis for it, and mind you, Mr. Kimelman is trying to get from this witness what he meant by various terms and he keeps repeating "I lied" and when he finally got to him he said, now look weare not asking whether you lied, what did you mean when you said it. It comes down to this.

MR. IANNUZZI: On page 4. I might suggest to the Court I cannot imagine by any stretch of the imgination except of creating some sort of prejudice as to this

statement, "a lot of Fuckin guineas" means organized crime.

MR. KIMELMAN: It is the "connected" part.

MR. IANNUZZI: The word "connected", who he is in business with, I do not know what he meant. For Mr. Kimelman to assume it in a question, and Your Honor said you allowed leading questions to help out, but this leading question did not help out.

MR. COHN: What Mr. Iannuzzi is saying is that the context of this whole thing did not warrant the introduction of that term. In other words it was initiated by Taylor not by Mignoli. It was Taylor who probed the whole thing and came up with the word "connected with". It was not Mignoli's words, it was Taylor's words. All you have is "a lot of fuckin guineas".

THE COURT: I agree with you, it was needless. I do not think it added to the case. He could have left it out and not weakened his case one bit. He chose to do it. All I can do is find that it is not prejudicial with everything else in this case, with charges of crimes of violence, the burning down of a garage, the burning of an automobile, the threat to break a man's leg, the indication from Mr. Mignoli himself that he roughs people up and he will throw them in the river, all that.

MR. IANNUZZI: That has not to do with Jack Schwartz what he does.

THE COURT: It is still Mignoli taking to Jack Taylor. How much did a question whether he was connected with the Mafia add to it? You already had it this big.

MR. IANNUZZI: We didn't ask him.

THE COURT: It was in the case without objection up to that point, that is what I am saying. If this was a case of a bad check charge and it was a commercial transaction and the lawyer out of the blue said, "and did you tell Taylor that the defendant Schwartz was connected with the Mafia", mistrial, no question about it.

MR. IANNUZZI: Roughing up people has nothing to do with organized crime.

THE COURT: Do you want me to spend time on that? There are four lawyers in the court room.

MR. IANNUZZI: I would like to end my aspects of it this way because people are roughing each other up and fightingeach other to collect money does not in any fashion signify an organized, sophisticated criminal activity and I suggest that the inference is very damaging and very prejudicial and I want to join in Mr. Cohn's motion.

THE COURT: If that is all you wanted to do Mr.

Iannuzzi motion denied. Have a nice weekend.
Do not come tomorrow please.

MR. KIMELMAN: I have one question for my future guidance. If I ask the witness, "what do you mean when you said that he was connected", and the witness answered, "I meant he was with organized crime" or "with the Mafia" would Your Honor have declared a mistrial at that point?

THE COURT: No, that was his meaning and he was using it.

MR. KIMELMAN: It was clear it was his meaning so if that is clear that is what Imeant. Why can't the prosecutor ask him isn't that what you meant.

THE COURT: You ask very difficult questions at ten minutes to five. I am trying to draw a line and I said it was not prejudicial. It is an imprudent way to do it. I would rather it came the other way because he may have had another answer to it that was not as significant or as suggestive.

MR. KIMELMAN: It was obvious he was not going to answer the question.

THE COURT: I think weshould have made another try at it and it should have been tried outside the hearing of the jury.

MR. COHN: Well, the witness did not answer and

could it ever justify the prosecutor saying in front of the jury, saying what he did, "do you mean the Mafia"

THE COURT: I think looking at this whole record and the abundance of material indicating that Schwartz engaged in acts of violence up to and including throwing people in the river and in the same light there is nothing to show that he does, but this is all gossip, the mere fact you say he is connected with the Mafia, Ido not think adds to it. I do not like the use of the term in any case if it can be avoided, but I think the exception is very clear on the record and I think you have a good point to argue. I do not think you are going to win it, but I think it is a good point to argue.

(continued next page)

rK/tk 1 1 MR. COHN: Let us hope we never have to use it.

6pm2 2 MR. IANNUZZI: May I say in conclusion Mr.
3 Kimelman suggested if the witness said it, well, it
4 have been a completely different story, then you would
5 have had the witness saying that as opposed to the
6 United States attorney assuming it and perhaps assuming
7 it incorrectly and putting words into the witness's
8 mouth.
9 THE COURT: Well, I can tell you and you cannot
10 predict what a witness is going to say.
11 MR. IANNUZZI: That is true.
12 THE COURT: If he knew he had to give a defini-
13 tion he would have to either say organized crime or
14 boys in Brooklyn or Mafia.
15 MR. IANNUZZI: I could give twenty meanings to
16 that.
17 THE COURT: Give me twenty meanings in this
18 context, go ahead and give me twenty meanings. Mr.
19 Iannuzzi is going to give me twenty meanings of what he
20 could mean in using that term.
21 MR. KIMELMAN: He was in a Bocci league.
22 MR. IANNUZZI: He is connected with --
23 THE COURT: In Brooklyn and New York.
24 MR. IANNUZZI: It doesn't make any difference,
25 you can have Italian contractors, Italian lawyers, Italian

stevedores, Italian anything, any one of those, who he could be connected with. By the word "connected" does that mean he is connected with a particular thing? He could be connected with any professional group, a laboring group or anything, that is the point. Mr. Kimelman is the one who said that it means the Mafia and he put it in the witness's mouth.

THE COURT: As a novelist you are very resourceful in imagining and as a novelist you can do it out of context, you do not have to talk in the real world. But here is a man that Mr. Miglono says throws people in rivers, who is told breaks legs. Now you are talking about contractors in Brooklyn.

MR. IANNUZZI: Judge, I guarantee there are contractors and laborers in Brooklyn that break people's legs and they don't know anything about organized crime, they do it just on a Saturday night for sport. And this is a jury that is supposed to be sophisticated and most of them have not been on a jury before, and I say how poisonous, to use Mr. Cohn's word, is that statement. I suggest I do not think it can be eradicated.

THE COURT: I have a lot of faith in the good sense of the jury and their ability to follow a charge and I think they understand that none of these claims can be used against Mr. Schwartz, none of these charges.

MR. IANNUZZI: I most respectfully disagree, and good afternoon.

MR. COHN: A very good weekend, your Honor.

THE COURT: See you at ten o'clock Monday morning promptly.

(Whereupon at 5:15 o'clock p.m. the trial was adjourned to May 10, 1976 at 10 o'clock a.m.)

THE COURT: Rebuttal should be limited to the matters brought out on the defendants' summation, but the defendants' summation covered everything. It's very difficult to confine a rebuttal.

MR. IANNUZZI: I suggest Mr. Kimelman didn't even try.

THE COURT: Either in time or in subject matter, because you touched on everything?

MR. IANNUZZI: I'm not concerned about the time. I'm concerned about the fact they have had two summations.

THE COURT: Your exception is noted.

MR. ROSEN: I join in that motion, your Honor.

THE COURT: Please seat the jury.

(The jury enters the jury box.)

THE COURT: Madam Foreman, Ladies and Gentlemen of the Jury:

Before I instruct you on the applicable law, the lawyers wanted me to make some reference to a statement that I'm going to refer to -- two statements that may have been made by Mr. Kimelman, first in his original summation and then his rebuttal summation.

The lawyers weren't quite sure whether Mr.

Kimelman said at one point, "In my opinion," and you must disregard any personal opinion that any lawyer might have not based on the evidence in the case.

The other was made in the rebuttal summation, and Mr. Kimelman indicated that the law prohibits threats of any kind. That isn't true. There are threats that people may make, as one lawyer indicated you may threaten someone with legal action. That's not a criminal offense, but the kind of threats that we're concerned with here is a threat of the use of bodily harm in order to collect an indebtedness.

I'll spend some part of the time in my charge distinguishing between principles of law that impose criminal liability, and that means when the law says someone is guilty, and principles of law that tell you how to deal with the evidence, because this has been a lengthy trial and the lawyers, I think, have very ably presented the evidence that they regard as important to each side, but I think it's very important that you should understand that many of the matters were evidence that had limited use and limited value.

I think it's important that you understand

the purpose of admitting certain evidence to come before you.

The charge in this case, I hope, will be an hour and a half or less. I don't know that you can sit much longer after listening to the lawyers talking for about four and a half or five hours a day and five or six hours yesterday. If you get tired or you're not listening, just raise your hand. I'll understand that you just can't absorb any more than what some humorist said "the seat can withstand." If you get a little tired, I won't be offended. Say, "Let's take a little rest." I may suggest that to you if I see you're nodding or not paying attention. Don't be ashamed of not being able to grasp everything all at once. It's important that you do listen to everything, and if you don't listen to every word, at least get the idea.

First we start with the title: United States of America against Jack Schwartz and George Sarkis, also known as "George."

There are three counts in the indictment, as you know. You must consider each defendant as to each charge against him, so that we have three charges against each defendant and two defendants.

In effect, you have six trials in one. You must give consideration to each count as against each defendant.

I may use the word "defendants" or "defendant." If I use "defendant" it means both unless I specifically refer to one of the defendants.I may say, "the accused." It means both defendants. If I want to refer to a single defendant as it applies to a charge I'm giving, I'll mention that defendant's name.

Each defendant is presumed to be innocent of all the charges in the indictment. The presumption of innocence is a strong presumption embodied in Anglo-American law, and it says in effect you must conclude at the outset of this trial that each defendant is innocent of the charge against him and that presumption, as I say, is a strong presumption, and that presumption alone is enough to acquit a defendant.

The Government's burden is to overcome that presumption. To overcome that conclusion of innocence by proof beyond a reasonable doubt. If the Government fails in that burden, then you are obligated -- you must -- find the defendant not guilty.

Charge of the Court

In Scotland we have three verdicts, and you heard the colloquial "Scotch verdict." Sometimes it sounds like a draw, "Scotch verdict," but it's not really that. In Scotland they have three verdicts, guilty, not guilty, and not proved. Here we have only two verdicts, guilty and not guilty. Not guilty means not proved, so your precise duty as jurors is not really to find out whether the defendant committed the crime charged, but to measure the proof that's been submitted to you against the burden of the Government and see whether the Government has sustained that burden, and if the Government has failed to do it, then find the defendants not guilty.

The Government's burden, as I say, is to prove the guilt of the defendants by proof beyond a reasonable doubt, and the Government starts with that burden and it remains with the Government throughout the trial. It never shifts to the defendants. As I say, the Government must prove the guilt of the defendants by proof beyond a reasonable doubt.

What's a reasonable doubt? A reasonable doubt is a doubt based on reason and common sense and the state of the record as distinguished from an imaginary, vague or speculative doubt.

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THE COURT: (Continuing.) A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act in a matter of importance to himself or herself. Proof beyond a reasonable doubt is therefore proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important and weighty of your own affairs.

The Government's burden is not to prove the guilt of a defendant beyond all doubt. The Government's burden is to prove the guilt of the defendant beyond a reasonable doubt. It's not the Government's burden to convince you beyond a reasonable doubt that every bit of evidence that was offered at the trial is true. The Government's burden is to prove all the essential elements of the crime charged beyond a reasonable doubt. And I will charge you later in the charge as to what the essential elements of the crimes charged are. We break up the statutory definition of the crime into elements, and that's the focus of what the Government's burden of proof is.

A reasonable doubt may arise from the failure of the Government to produce evidence. The defendants do not have to prove their innocence. On the contrary,

the defendants may rely on the failure of the Government to prove their guilt.

In Mr. Iannuzzi's summation he referred to the failure of the Government to produce employees of the airlines to support a portion of Mr. Sarkis' testimony concerning space on the plane back to Puerto Rico on April 23rd.

He also called your attention to the failure of the Government to produce witnesses to support Mr. Ebbert's testimony when Mr. Ebbert testified that when he goes out on repossessions at times he calls on his brothers or friends to help him on difficult repossessions.

When you determine whether this failure is failure testimony of a material nature or whether it's testimony that would have been cumulative -- in other words, there is testimony in the case already -- or whether it's fresh testimony, you determine whether it is the kind of testimony the Government should have produced in the trial. You determine whether it is testimony that was calculated to support the point made by Mr. Iannuzzi.

Now, you understand that the defendant is not obligated to produce any proof at all, but you also

should be made aware of the right of a defendant to bring in any evidence he chooses to bring in by subpoena. The defendants have the subpoena power, just as the Government has the subpoena power.

When we talk about reasonable doubt of the state of the record, I call your attention to character evidence offered by Mr. Schwartz in the person of the Borough President of Queens County, Donald R. Mannis, William Lynch, Abraham Cohen, Mr. Justice Harry B. Frank and Francis J. Fajela. I think those are all the character witnesses. If I had any I included that testimony too.

They testified in effect that in their opinion Mr. Schwartz was a man of honesty, truthfulness and a man who would not indulge in violent conduct.

The jury should consider this evidence along with all the other evidence in the case in determining the guilt or innocence of the defendant Schwartz. Such evidence as is inconsistent with traits of character ordinarily involved in the commission of the crime charged, in other words, the use of exttrtionate means to collect an extension of credit, may give rise to a reasonable doubt, since the jury may think it improbable that a person possessing those traits of

character to which the witnesses have testified would commit such a crime.

In considering the evidence in the case of course you don't consider the number of witnesses each side produced -- that's not important -- you consider the quality of the evidence, you consider whether the evidence is pertinent to the issues involved.

Now, what is evidence? Evidence is the method by which a disputed fact is proved or disproved. There are two general classifications of evidence. One is direct evidence and the other is called indirect evidence, or commonly called circumstantial evidence. Direct evidence is testimony of a disputed fact that a witness testifies to directly concerning that disputed fact.

Circumstantial evidence on the other hand is a method of determining a disputed fact by drawing an inference based on reason, experience and common sense. I think an example would be appropriate. It's an example I have used over and over again, and I'll try it again.

If you were sitting here as a jury in a personal injury action, where let's say A, Mrs. A was suing Mr. B for personal injuries, charging that Mr. B while

driving his car passed a stop sign without stopping, let's assume a hypothetical state of facts, let's assume my Courtroom Deputy, Mr. Adler, and myself were standing on the corner one afternoon chatting. On the corner was a stop sign. Let's assume I had my back to the stop sign, while Mr. Adler was facing me and had the stop sign in full view.

Well, if Mr. Adler were called by one of the parties to testify he might very well testify that he was talking with me, and through the corner of his eye he saw a 1976 White Cadillac proceeding at 60 miles an hour pass the stop sign on the corner and strike Mrs. A, the plaintiff, causing injuries. Now, that is direct evidence on that disputed fact. I must first identify the disputed fact.

If I were called to the stand concerning that same fact I could not give direct testimony. I did not have the stop sign in view. But that doesn't disqualify me as a witness. I have testimony to give concerning the circumstances from which the jury might reasonably infer that the motor vehicle passed the stop sign without stopping.

I might for example say that while talking to Mr. Adler through the corner of my eye I saw the white

Cadillac coming down the street at about 60 miles an hour, and then I lost sight of it for about 150 feet, and then two seconds later I turned to my left and I saw the same Cadillac at the same speed strike Mrs. A. Now, there is circumstantial evidence concerning the same fact. A car driving at 60 miles an hour, traversing 150 feet in two or three seconds. The car could not have stopped and started again in that time.

So there you have the circumstances from which you can draw an inference based on common sense and experience, determining the same fact as was testified to through direct evidence.

The law does not hold that one type of evidence is of better quality than the other. At times direct evidence is of better quality and at times circumstantial evidence is of better quality.

The law requires the Government to prove the guilt of a defendant on both the direct and circumstantial evidence by proof beyond a reasonable doubt.

What is the evidence in the case? Well, first it's the sworn testimony of all the witnesses, regardless of who may have called them. Secondly it's all the exhibits that we received in evidence, regardless of who may have produced them.

7 Charge of the Court

At times some exhibits were marked for identification. That's not evidence, it's not part of the record. When it's marked Exhibit 1, 2, 5, or 6, or Exhibit A, B or C in evidence, then it's part of the record.

The reason we mark other exhibits for identification is because if someone reads the record and the witness refers to a document it is marked so it can be identified as a document the witness referred to. That is why it is for identification instead of in evidence.

Marked in evidence in this case were various tapes. I charged you before and I charge you again it's the tapes and what you heard on the tapes that is evidence of what occurred. The transcripts are only the lawyers' version of what the tapes say, and it is your interpretation of what is on the tapes that counts. Those transcripts were offered to you only as a guide so you could more easily understand what was on the tapes.

In considering the statements of Schwartz and Roth on the tapes it's what Schwartz said in the context of Taylor's statements or McGhee's statements. MrGhee's statements alone or Taylor's statements alone

and standing alone without any response or without any proof as to the reaction of either Schwartz or Roth, should be disregarded by you. These are offered by the Government to show what Schwartz said and what Schwartz meant. Conclusory statements by Taylor, for example saying "You know you threatened me," standing alone without any proof as to Schwartz's reaction or any other proof of the circumstances under which it was said, in the absence of a response of any kind by Mr. Schwartz, should be disregarded by you.

In addition the evidence in the case consists of facts which may have been stipulated to by the attorneys, and I think there were some facts stipulated. Other facts of which the Court took judicial notice. I take judicial notice of matters that are easily supported by irrefutable documents, like if I say April 18th, 1975 was a Friday, or April 21st was a Monday, it's because I"m looking at the calendar, and I take judicial notice of it, and that too is part of the record.

So it is that record of the fair and reasonable inferences based on your experience and good common sense that must be the basis of your verdict as to each defendant, as to each count.

9 Charge of the Court

It might be helpful to call your attention to what is not part of the record and what you may not consider as evidence in the case: Number 1, the statements of counsel in their openings. Counsel appeared before you and told you what their positions were with reference to the issues in the case. They are designed as a helpful guide so you may more easily follow the evidence as it comes in.

As I indicated to you, evidence comes in almost like a crazy quilt, it doesn't come in in any logical order or any time sequence, and so if you understand the positions of the parties it makes it more easy to follow.

Statements made by counsel in summation are not evidence. They serve a very useful purpose. They call attention to the jury of the evidence that both sides believe is of importance. They also contain arguments made by both sides, theories of inculpability argued by Mr. Kimelman. He argued before you and said that the Government proved the guilt of the defendants by proof beyond a reasonable doubt.

Mr. Iannuzzi and Mr. Cohn appeared before you and argued theories of exculpability, said the Government has failed in its burden and that you must

find the defendants not guilty on all the counts charged.

Now again, they are helpful guides. Because the lawyers said it doesn't mean you are obligated to accept any argument or any theory on either side. One may appear to be attractive to you, one may strike you as having some sense. I don't mean others don't, but I mean you may take a fancy to it, you may want to adopt it. And that again is the help that is offered to the jury in seeking out the truth, which is the purpose of the trial.

At times the Court directed the Reporter to strike certain evidence from the record. And just as I direct the Clerk to physically strike it from the record, so you were directed to figuratively strike it from your memory and consideration.

At times objection was made to questions. It's the lawyers' job. Some reference was made to the fact that one lawyer made more objections than the other. There is nothing wrong in that. This case is the United States of America against Jack Schwartz and George Sarkis, also known as George, and it's not Mr. Kimelman against Mr. Cohn or Mr. Iannuzzi.

And incidentally, in reciting this caption more

thanonce I might say the mere fact that it's the United States of America - and we must all concede that that is an imposing caption for a prosecution -- in this Court everybody stands equal, the United States of America stands no higher in this Court than the defendants Schwartz or Sarkis. That's what we mean by justice.

The Government has a burden, you see that they carry it. If they don't, don't hesitate to do your duty.

But as I say, it's the lawyers' job to take objection, and at times when I sustained objection you may not speculate on what the answer might be had the witness been permitted to answer. It's for the very same reason I indicated, that it isn't in the record, it's not part of the proof, and you may not consider it.

I might stop at this point to take note of the participants in the trial and tell you something about their respective roles. We talk about disputed facts, and of course you recognize clearly that on the one side the defendants took a position and on the other side the Government took a position. There were a few minor instances which I think the defendants did not

12 Charge of the Court

wholly agree, if I recall correctly, but for our purposes it was the Government on one side and the defendants on the other.

Well, this is an adversary proceeding, and the role of the lawyers is to represent clients and represent their cause. The lawyers are protagonists in the performance of their duty and the zeal that is required to properly prosecute and defend an action. It is expected that lawyers would vigorously argue their case. That's the role of the lawyers. It's an adversary proceeding.

The roles of the Court and jury are somewhat different. The Judge, the Court, is the sole judge of the law, and the jury is the sole judge of the facts. It's very important to know and understand the distinction, and understand a clear line of demarcation of the functions and authority in the trial.

You are obliged to accept the law as I charge it. When I charge the law, Sections 892 and 894 of Title 18, that's a statutory law. It's not for you to say that it's an unfair law or that you don't like the law. It's the law. The law is uniformly applied throughout the country, here, California, Texas, Wisconsin, anyplace. This is the United States law.

And because it is uniformly applied there is predictability, there is stability. That's what makes for law in this country, in a country that lives by law.

So the same is true with the law that I am charging you now. You must accept it even though you disagree with what I am saying. I am giving you my interpretation of the law as I understand the law to be, not th law that I made, but the law that's been decided or that the Congress enacted. And you must accept the principles of law as I charge them.

Just as I am the sole judge of the law, you are the sole judge of the facts. You and you alone decide what happened in this case, and you and you alone will come to one of the vital issues in this case, and that is the state of mind of Mr. Schwartz, the state of mind of Mr. Sarkis.

Now, we talk about state of mind. You can't have direct evidence on state of mind. It means, if you can think of it, opening up someone's mind and looking in. That would be direct evidence, which of course is a notion that we need not even talk about.

State of mind is usually, almost always, indicated by what the individual says and by what the

individual does, and that's what we mean by circumstantial evidence.

But having made those fact findings on what happened, on state of mind, then you apply the law as I give it to you, and then you come to the verdict in this case as to the guilt or innocence of each defendant as to each count charged.

But it's very important that you recognize the obligations of the lawyers. I might say that the lawyers on both sides performed in the highest tradition of the law. They did an excellent job for their respective clients and they performed their functions. And a jury trial under our system works best when each one puts forth his or her best efforts to perform the function assigned to him or her, and understanding and recognizing the role of the other participants in the trial.

I have used the terms inference and presumption, and I think I should define them. An inference is a conclusion which reason and common sense lead the jury to draw from the facts which have been established by evidence in the case.

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Charge of the Court

THE COURT: In other words, the jury may draw an inference, but it draws an inference based on the facts in the case, using your good common sense and experience.

A presumption on the other hand is a conclusion which the law requires the jury to make and continues only so long as it is not overcome or outweighed by evidence in the case to the contrary. But unless and until the presumption is so outweighed, the jury is bound to find in accordance with the presumption. And of course an example of that is the presumption of innocence. And it can only be outweighed by proof beyond a reasonable doubt to the contrary.

You the jurors are the sole judges of the credibility of the witnesses, which means that the believability of their testimony and the weight their testimony deserves. Scrutinize the testimony given and the circumstances under which each witness testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Take into consideration the witnesses intelligence, the motive and state of mind of the witness. Here again we have state of mind for a different reason. What is the witness thinking of as he is testifying before you and

why is he testifying. In considering the motive of McGhee and Taylor you may take into consideration whether they owed money to Gaines Leasing Service, Inc., or whether, more importantly, that they believed they owed the money and whether they believed that a conviction of the defendants might foreclose any action by Gaines Leasing to recover the debt, in other words, whether the debt would somehow be forgiven or otherwise satisfied.

Take into consideration the demeanor and the manner of the witness while on the witness stand. Did the witness answer fully? Did the witness answer directly? Did he answer in an evasive manner? Was he hesitant? Now, of course, use your good common sense in evaluating the witness on that fact. Take into consideration, for example, on cross-examination, where the witness is directed to answer yes or no, or that he can't answer yes or no. Well, there are limitations and restrictions placed on the witness. And I told you that there was a good reason for it. But on the other hand you must recognize that it is not easy for a witness to sit there and find a question, wall, partly true, or maybe seventy five per cent true, and should I answer yes or no or should I say, "Well,

Charge of the Court

I can't answer yes or no," and might even hesitate. But again you are mature grown up citizens. You have come across the evaluation of credibility of persons you come in contact with in your social and familiar life and you know how to judge credibility. We just give you these guidelines as suggestions. And do not think they are strange to you. You just think about it, and you have been doing it all your life. Take into consideration the witness' ability to observe the matters that he is called upon to testify to as to whether the witness shall have impressed you as having an accurate recollection of the matters to which he testified to. Take into consideration the relationship that each witness might bear to either side of the case, and the manner in which each witness might be affected by the verdict. Take into consideration the extent to which a witness is corroborated, supported that means, or contradicted by other testimony in the case. At times during cross-examination the witness is faced with statements that the witness said or made at a time prior to the time that he took the witness stand. It may have been before the Grand Jury or statements made to the Government agent. Well, this is called impeaching testimony. The effort on the part

of the cross-examiner was to show that because the witness told something differently at a time before he took the witness stand, that it detracts from his credibility or impeaches his credibility, his believability. Well, again you must use your good common sense. Understand all the circumstances that the prior statement was made under. Determine whether the inconsistent statement is as to a material or an immaterial fact. Determine whether the prior consistent statement was a mere error in narration or whether it was intentional lie. And then having determined that, you determine the extent to which, if any, it impeaches the witness' credibility. You and I know from experience that if you heard someone tell the same story time and time again with the same gestures, with the same emphasis, with the same pauses, you would not believe the story, or you might not believe the story. You would feel that it was rehearsed. So there are some normal variances that may even lend support to the testimony. You might believe it more because the exact words weren't used, the same pauses were not there. So you use your good common sense in determining the extent to which, if any at all, a prior inconsistent statement impeached the credibility of any witness.

You want to take a little rest at this point? Suppose you take five minutes. All right.

(The jury thereupon retired from the courtroom at 3:30 o'clock p.m.)

(The following occurred in the absence of the jury.)

THE COURT: I'm not going to take too long a break.

MR. ROSEN: I just want to put on the record -- I do not know what to do about situations like this -- but we clocked jurors three, eight, ten, eleven and twelve out.

THE COURT: Look, the mere fact somebody holds his head or closes his eyes does not necessarily mean he is asleep.

MR. ROSEN: I am just making this -- this was during the credibility charge, and that is why I think we tried to call your deputy's attention to the fact that at least the back row were really having trouble, without any disrespect, I am sure.

THE COURT: I recognize that they are a little weary. They have been battered for two days by four summations.

MR. ROSEN: I understand.

THE COURT: So I get a weakened group of jurors. I have seen jurors falls asleep, but not on my charge, on lawyers' summations. But I have just awakened them. I have got my eye on the jury.

MR. ROSEN: I just thought one or two jurors were really having trouble. I think they needed the break.

THE COURT: Don't go out because I am going to call them right back. See if they are ready to come back.

Martin, is it warm in here?

THE CLERK: Yes, your Honor.

THE COURT: Ask them to come up to lower the temperature. It is a little too hot anyway. I like it about sixty five.

MR. IANNUZZI: Do you anticipate the jury going out tonight?

THE COURT: I am very seriously thinking of just excusing them so I don't lose a juror. I am afraid if I have got twelve jurors and they deliberate for half hour or an hour, that if somebody gets sick overnight I have lost the jury.

MR. KIMELMAN: I would not have any objection to just excusing them.

THE COURT: I will ask them to start early

tomorrow with their deliberations.

MR. KIMELMAN: Excuse them and maybe have them come in about 9:30.

THE COURT: I would like them in even at 9:00 o'clock. I am supposed to start picking another jury at 10:00 o'clock.

MR. IANNUZZI: Judge, you said you were not going to work this hard.

THE COURT: Well, I'm not getting any help from lawyers, I will tell you that.

MR. IANNUZZI: Do you think, Judge, there is any point of querying the jury, without consulting them, if they missed anything or need anything repeated.

THE COURT: If you want me to do it I will do it, but --

MR. IANNUZZI: I do not mean to suggest -- I know what the answer is too.

THE COURT: I know when the jury is asleep and inattentive. I have seen jurors just close their eyes and hear every word that was spoken. I recognize some jurors are looking straight at me but they haven't heard a word I said.

MR. IANNUZZI: There is no way of telling.

THE COURT: I think I can recognize that. There are times when I have stopped and said that I

will excuse the jury. I have not seen it necessary here.

I saw Juror Number 6 with his head in his hand and closing his eyes now and then. I can tell you he was attentive.

MR. IANNUZZI: Yes, I think it is mostly in the back row.

THE COURT: Well, I will try to reach the back row.

MR. IANNUZZI: Maybe you aren't getting all the way back.

THE COURT: Gentlemen, the jury is returning to the courtroom.

(The jury thereupon returned to the courtroom at 3:37 o'clock p.m.)

THE COURT: When we took a break I was charging you on believability of the witnesses. If you find that any witness knowingly and intentionally testified before you falsely as to any material fact you may disregard all that witness' testimony on the theory that the witness is unworthy of belief. You must discard that testimony that you find is false, but you may, if you wish, accept and consider that portion of the testimony that you recognize is believable. That principle just underscores the wide discretion the jury

has in assessing the credibility of witnesses.

Grove Ebbert testified that he participated in the crime charged. Now, the mere fact that Grove Ebbert says that he participated in the crime charged should not be weighed against either of these defendants. You may not infer from his plea of guilty any guilt on the part of the defendants. That was Grove Ebbert's plea. But he did say he participated in the crime charged. You have a right to suspect the testimony of a participant in the crime charged if you find that he has a personal stake in the outcome of the trial or if find that he believes that the rewards promised depend on the outcome of the trial. Grove Ebbert is not incompetent because of his participation in the crime charged. On the contrary the testimony of a participant alone, if believed by the jury to be true beyond a reasonable doubt, may be of sufficient weight to sustain a verdict of guilty even though not corroborated or supported by other evidence in the case.

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THE COURT: (Continuing) The jury should keep in mind that the testimony of a participant is always to be received with caution and weighed with great care. You should never convict an accused on the unsupported testimony of an alleged participant unless you believe the testimony to be true beyond a reasonable doubt.

As I said before, the defendant was not obligated to offer any proof. He was not obligated to take the stand and testify. But in this case both the defendants did take the stand and testify. Now their testimony is to be viewed by the same measures, weighed on the same scale, and judged by the same factors as any other witness.

Now we come to the charges in the indictment. As I say, the indictment is the law's method of bringing a defendant to court to answer the charges in the indictment. The statements in the charges are not proof of the charges. In other words, it is as if someone sued you for $100 in the civil court and you said, "General denial," that someone couldn't come into Court and offer the complaint against you as proof you owed him money. He would have to bring testimony in. He would have to prove it separate and apart from his complaint. And so here the indictment is not entitled

to any weight. It is just a method of advising a defendant you are charged with the crime. And the defendants have said, "Not guilty," to each and every charge in the indictment.

Now, count 1 is a charge claiming that Jack Schwartz and George Sarkis used extortionate means to collect an indebtedness due from Jack Taylor.

It reads as follows:

"On or about and between April 18, 1975 and July 10, 1975, both dates being approximate and inclusive, within the Eastern District of New York, the defendants Jack Schwartz, Grove Ebbert, and George Sarkis, also known as "George," knowingly, willfully and unlawfully used extortionate means, as that term is defined in Title 18, United States Code, Section 891(7), in collecting and attempting to collect extensions of credit from Jack Taylor by expressly and implicitly threatening Jack Taylor with the use of violence and other criminal means which would cause harm to the person, reputation and property of Jack Taylor and others." In violation of "Title 18, United States Code, Section 894 and Section 2." I am giving you those numbers because I will be reading those sections.

Count 2 charges the defendant Jack Schwartz and

George Sarkis with using extortionate means in an attempt to collect indebtedness from Fred McGhee.

It reads as follows:

"On or about and between April 21, 1975 and July 10, 1975, both dates being approximate and inclusive, within the Eastern District of New York, the defendants Jack Schwartz and George Sarkis, also known as "George" knowingly, willfully and unlawfully used extortionate means, as that term is defined in Title 18, United States Code, Section 891(7), in collecting and attempting to collect extensions of credit from Fred McGhee by expressly and implicitly threatening Fred McGhee with the use of violence and other criminal means which would cause harm to the person, reputation and property of Fred McGhee and others and thereafter using violence and other criminal means which caused harm to the property of Fred McGhee and others," in violation of "Title 18, United States Code, Sections 894 and 2."

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Charge

THE COURT: (Continuing) Now, these are what are called substantive crimes. It is the actual use of extortionate means. It is the threat made with intent to instill fear for the purpose of collecting an indebtedness. The last count. Count 3, proscribes, prohibits, makes a crime the getting together by two or more persons for the purpose of using extortionate means, and that is called the "conspiracy charge." It reads as follows:

"On or about and between April 18, 1975 and July 10, 1975, both dates being approximately and inclusive, within the Eastern District of New YOrk, the defendants Jack Schwartz, Grove Ebbert, and George Sarkis, also known as "George," did knowingly, willfully and unlawfully combine, conspire, confederate and agree together with Seymour Roth, named as a co-conspirator but not as a defendant herein, to use extortionate means, as that term is defined in Title 18, United States Code, Section 891(7), to collect and attempt to collect extensions of credit from Jack Taylor and Fred McGhee and to punish Jack Taylor and Fred McGhee for the non-repayment thereof, in violation of Title 18, United States Code, Section 894."

Now, most of our federal statutes are codified

under various titles. Title 26, for example, is income taxes. We have other titles for other subject matters. Title 18 is entitled, "Crime and Criminal Procedure," so it is the Congress that determines what is a crime, and the Congress defined the following as a crime: The three counts are based on this statute. It is captioned:

"Collection of extensions of credit by extortionate means. Whoever knowingly participates in any way -- and I am hesitating there because that is the substantive crime -- whoever knowingly -- and that is important, whoever knowingly participates in any way or conspires to do so, and that's where the conspiracy crime is defined, in the use of any extortionate means:

"1. To collect or attempt to collect any extension of credit, or

"2. To punish any person for the non-repayment of, commits the crime charged."

There are statutory definitions which further define the crime. The first one is under 891(1) which says:

"To extend credit means to make or renew any loan or to enter into any agreement, tacit or express

whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising may or will be deferred."

That means it doesn't matter how the debt arises. It doesn't matter whether it is disputed. If it is claimed, it is enough.

"(2) The term creditor with reference to any given extension of credit, and we use extension of credit here as meaning indebtedness, somebody owes somebody money, refers to any person making that extension of credit or to any person claiming by or through any person making that extension of credit.

The term debtor with reference to any given extension of credit, refers to any person to whom that extension of credit is made," and I won't read the rest because that isn't relevant.

Subdivision 5 of Section 891: "To collect an extension of credit means to induce in any way any person to make repayment thereof."

I do not think 6 is pertinent, but 7 is the subsection that is cited in all the three counts:

"An extortionate means is any means which involves the use or an express or implicit threat of use of violence or other criminal means to cause harm

to the person, reputation or property of any person."

In order to sustain its burden as to count 1, the Government must prove beyond a doubt these three essential elements of the crime charged:

1. That on or about and between April 18, 1975 and July 10, 1975, that Taylor was indebted to Gaines Leasing Service -- I hesitate because I do not know whether it is Service Corporation or Inc. -- or Schwartz claimed that Taylor owed money to Gaines.

2. That the accused knowingly made threats of physical bodily harm to Taylor.

3. That such threats were made to collect the indebtedness.

Count 2 has almost the same three essential elements.

1. That on or about and between April 21, 1975 and July 10, 1975 McGhee was indebted to Gaines Leasing Service Corporation or Schwartz claims that McGhee was indebted to Gaines Leasing Service Corporation.

2. That the accused knowingly made threats of physical harm to McGhee.

3. That such threats were made,

A) to collect or attempt to collect the indebtedness, or

B) to punish McGhee or Taylor to repay the

indebtedness.

Now, the Government claims one of the means used to collect the money or to punish McGhee was a setting of the fire to McGhee's garage and motor vehicle. This is charged as one of the overt acts that I will discuss later when I talk about count 3 in the indictment. In order to sustain this act as an extortionate means, the Government must prove beyond a reasonable doubt that the fire was set for the purpose of collecting the indebtedness due or allegedly due Gaines from McGhee, or to punish McGhee for failing to repay it. The setting of the fire alone does not prove the crime. In other words, the Government must prove beyond a reasonable doubt that it was done for the purpose of collecting the debt or punishing McGhee. The gravamen of the crime, the nut of the crime, the central issue that must be determined is the making of threats of bodily harm with intent to instill fear in the debtor for the purpose of collecting the debts or for the purpose of punishing the debtor for failing to pay. The fear must arise from the willful and intentional conduct of the accused, rather than from some abnormal temperamental timidity of the debtor. In other words, whether or not the alleged victims

McGhee or Taylor, were in fear is important to this case only as it reflects on the intent of the accused. We have heard a lot of testimony about whether Taylor and/or McGhee were really in fear. The issue in the case, and I point to the essential elements of the crime charged, is whether the accused knowingly made the threats. Knowingly meaning whether the accused was aware that he was making the threats and that he made them with the intent to instill the fear. That's the essential element of the crime charged.

Then why all the testimony? Probably countless hours during this trial and time taken in summation by both sides as to whether Taylor and/or McGhee were in fear. Well, the thought is that if Taylor and McGhee are the normal-average individuals, not overreacting to statements and not underreacting to statements, that in determining whether either of them were actually in fear, and if you decide their reaction was that of a normal individual, then you might consider that as something of a measure, as a barometer, not as the determining fact as to whether when Schwartz made statements like "I'll break your legs" or other statements, or when Sarkis, if you believe he said something like, "I'm not here to hurt you," whether

those statements were made intending to instill fear in the alleged victims.

Now, there is testimony in the case concerning rates of interest, finance charges, and stolen trailers. The Government has conceded, and I charge you, that the rates of interest charged in the finance charges were perfectly lawful transactions and may not be considered by you as evidence of any wrongdoing. I charge you additionally, and the Government has conceded, that there is no evidence in the record in any way to suggest that the defendant Schwartz had any connection with stolen vehicles. You must completely disassociate any such implication from your minds in deliberating on the defendants' guilt or innocence.

Again, there was abundant testimony of Taylor's practices, his irresponsibility, his failure and refusal to pay others; McGhee's failure and/or refusal to pay others, misrepresentations made by Taylor to Schwartz, and I say there is evidence of that. I am not making the fact finding. You decide whether that occurred. I am not saying that there is evidence of that kind. I am saying that there is evidence of that kind, the demands of Taylor to be reimbursed for

money he apparently paid for a truck that turned out to be stolen, or his claim that he made repairs, and whether or not the repairs were actually made. Again, this testimony was introduced into the case for a very limited purpose. The state of mind, again, of Schwartz is one of the critical issues of this case. Whether when he said certain things, did he say them intending expressly or absolutely or implicitly instilling fear into McGhee or Taylor, with the intent that the fear of personal harm induced Taylor and McGhee to pay the money.

(continued next page)

Charge of the Court

Proof, as I already charged you, proof of indebtedness due Gaines might also be considered when you consider the credibility of McGee and Taylor. I told you if they believed that somehow their debt would be satisfied, forgiven, or that Schwartz wouldn't pursue his remedies if they were convicted, then, of course, you may use it for that purpose.

The other line of testimony that took some time was testimony by Mr. Mignoli that Mr. McGee had a shotgun, and he told this to Mr. Schwartz.

The evidence through the testimony of Mr. Mignoli that he had a shotgun -- it may have been through others -- maybe Mr. Taylor's former employee, whose name escapes me -- it isn't important --

MR. IANNUZZI: Iann.

THE COURT: It might have been him. --was admitted solely for the purpose, if you believe the testimony, to permit Mr. Schwartz to explain why he brought a bodyguard in to protect Mr. Ebert and for no other purpose.

Mr. McGee is not on trial here. Mr. McGee's testimony may be on trial before you, since you will

weigh his testimony, but the defendant Jack Schwartz and George Sarkis are on trial, so I said whether or not Mr. McGee had a shotgun or not is not a matter for you to determine. If you determine he did have a shotgun, it is only with relation to explaining or supporting Mr. Schwartz's testimony that he believed Mr. McGee would be dangerous and thought Mr. Ebert needed protection.

You have heard testimony about the practice of repossessing automotive equipment. There is absolutely nothing illegal or improper in the forcible repossession of property. In fact, such activities under the proper circumstances are authorized by law.

Now, the defendants have offered evidence that immediately prior to the time that McGee's garage and motor vehicle were burned, that Sarkis and Ebert had been drinking over a long period of time. The burning of the garage is one of the acts claimed by the Government under Count 2 of the indictment as one of the means used in an attempt to compel McGee to pay his obligations and it is also one of the overt acts claimed by the Government as part of the conspiracy, and I will charge you on conspiracy

shortly.

I direct your attention only to the defendants' claim that Sarkis and/or Ebert did not have the mental capacity to commit the criminal act against McGee on the night of April 23, 1975.

In every crime there are two main parts, two main ingredients. One is what we call the proscribed conduct. The statute says, "Don't do this." Then it says, "Don't do this knowingly." That is what we call the mens rea, the criminal incent, the state of mind.

In order to convict anyone of performing a criminal act, or, in this case, since the criminal act charged is part of the federal crime charged, the act must be knowingly performed. In other words, the Government must prove beyond a reasonable doubt that the defendant Sarkins and/or Ebert, whoever committed the crime, had the mental capacity to commit that overt act and/or crime.

Evidence of intoxication alone does not immunize either Sarkis or Ebert against the imposition of criminal sanctions. However, the Government must prove beyond a reasonable doubt that the individual or individuals who set fire to McGee's

garage and car possessed the mental capacity to commit the crime.

A person is not criminally responsible for his conduct if at the time of the act as a result of voluntary intoxication he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. So the Government must prove beyond a reasonable doubt that affirmatively he did appreciate the wrongfulness of his conduct. Even if he was intoxicated, the Government can still prove that he did understand and appreciate that his conduct was wrong, and he appreciated the wrongfulness of it and was able to conform his conduct to the requirements of law. In other words, he had possession of his own faculties and he could have conducted himself lawfully.

In determining whether the alleged victims were in fear, you may take into consideration the relationship between the alleged victims and Mr. Schwartz and determine whether or not the victims were really in fear.

Take into consideration that relationship.

I will shortly charge you on conspiracy, but

before I do that I want to charge you on what we call "aiding and abetting."

Section 2 of Title 18 reads as follows:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.

"Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

In other words, it isn't necessary for the Government to prove in the commission of a substantive crime that the accused performed every act constituting a crime. Every person who willfully participates in the commission of a crime may be found to be guilty of that offense. Participation is willful if done voluntarily and intentionally and with a specific intent to perform the act. In other words, to aid and abet another to commit a crime it is necessary that the accused willfully associate himself in some way with the criminal venture and willfully participate in it as he would in something that he wishes to bring about.

In other words, the participation must be voluntary, intentional, and not just accidental.

In the statute and in the counts of the indictment that I charged you on the essential element of the crime is that the accused knowingly used extortionate means. That is the criminal intent necessary in order to prove the commission of the crime. It means that the Government must prove beyond a reasonable doubt that the accused was fully aware of what he was doing and in making the statement he knew it was a threat, that in making the statement he did it voluntarily and intentionally, and he knew and did it for the purpose of instilling fear into the alleged victim, for the purpose of collecting the indebtedness due.

The crime of conspiracy sounds like aiding and abetting, and in trying to distinguish the difference between one who aids and abets and one who willfully participates in a crime, although he does not commit the crime himself, or in a conspiracy where he fully enters a conspiracy and helps it along, sounds almost like the same definition. But the significant difference is a theoretical one, a conceptual one. You cannot have aiding and abetting

unless you prove the substantive crime has been committed. In conspiracy you do not have to prove that the substantive crime has been committed, because it is the agreement, the going in with others to commit the crime that the law proscribes and says is a crime, and not the commission of the crime.

In conspiracy the crime has been completed. It is difficult to explain the practical difference, so I warn you of that at this point before I tell you what a conspiracy is:

A conspiracy is a combination of two or more persons -- in this case the two or more persons are the accused, Schwartz, Sarkis, Grove Ebert, and named as a co-conspirator, Sy Roth -- to accomplish some kind of unlawful purpose.

(Continued on the next page.)

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a:jk 6pm R1

Charge

THE COURT: (Continuing) It is the kind of partnership in criminal purposes. It is like a legitimate partnership. If two or more people -- for example in the clothing business let's assume one man was a salesman on the floor, the other was the window dresser, and the third partner went out and bought the suits and clothes for sale, that's a legitimate partnership.

In that partnership if one individual says or does something during the term of the partnership and for the business of the partnership, for example, goes out and buys suits, we'll say, and brings them into the store, that binds the other members of the partnership.

Well, a partnership in the criminal side is called a conspiracy, and the members of the partnership instead of being called partners are conspirators. Just as partners may bind each other in the business of the partnership, during the term of the partnership, so can conspirators acting for the purpose of the conspiratorial business bind the other conspirators.

For example, in that same partnership in the clothing store instead of buying the clothes, suppose Mr. A, who is supposed to buy the clothes, hijacked a load of clothes. Let's say he told the salesman, his

partner who was on the floor, but didn't tell the window dresser. Well, here we have an unlawful conspiracy, now, that was for the purpose of hijacking clothes and selling stolen clothes knowing that they were stolen.

Now, whatever each partner in the conspiracy did, those two, would bind each other. No. 3 might still be window dressing and not know that it happened. He wouldn't be a member of that conspiracy.

So knowledge and the willingness and intent to enter into a conspiracy is what makes an accused a member of the conspiracy.

Now, the mere association with individuals or the fact that they meet together and discuss common aims and interests does not necessarily establish proof of the existence of a conspiracy. In this case, for example, Mr. Roth's association with Mr. Schwartz was in effect that of employer and employee, and between Schwartz and Ebbert in effect one of contract repossessor of vehicles owned by lessees or car owners in default on their payment. That fact does not bring them into the conspiracy. The Government must prove beyond a reasonable doubt that they did something outside, not physically outside the place, but outside that relationship and into criminal activity, where

they knew there was a conspiracy and knowing it entered the conspiracy.

I'm not saying that a conspiracy is established here, I'm saying for this specific charge, assuming that that was established, that in order to bring anybody into the conspiracy the Government must prove something in addition to just that relationship. They certainly have the right to associate, to be with one another on legitimate business.

However, the Government need not prove that parties entered into any formal partnership agreement to use extortionate means to collect debts allegedly owed or that they sat down or expressly agreed to their unlawful plan or how they were going to carry it out. The Government cannot prove that the partnership, the conspiracy, was established informally, by something they said to one another, by something that they did. What the evidence must show beyond a reasonable doubt is that the parties tacitly or through some implied understanding were aware of their plan to use extortionate means to collect the debt or to punish a debtor for failing to pay his debt. An unlawful conspiracy is by its very nature a covert, secret plan.

If the Government proves the existence of the conspiracy alleged in the indictment from the acts and

statements of the alleged conspirators by proof beyond a reasonable doubt, and proves that any two of the alleged conspirators knowingly and intentionally joined, combined, conspired and agreed to use extortionate means to collect or attempt to collect from Taylor and McGhee a debt or to punish McGhee for failure to pay the debt, it has then established the existence of the conspiracy.

Now, one may become a member of the conspiracy without full knowledge of all of the details of the conspiracy. On the other hand, a person who has no knowledge of the conspiracy but happens to participate in some activity which helps achieve the objectives of the conspiracy does not thereby become a conspirator, and of course the example I gave you is the window dresser, who is part of the operation but wasn't aware of what was going on. He doesn't become a conspirator.

In other words, the action of an accused must be in combination with the awareness of the purpose of the conspiracy before you may find an accused to be a member of the conspiracy.

There is no proof in the record that the defendant Schwartz instructed Sarkis or anyone else to burn McGhee's garage or take any specific action, or that he was aware of any plan to commit that act of

violence or any other act of violence. It is not necessary for the Government to prove that Schwartz knew or had any reason to know of a plan by Ebbert or Sarkis or both to burn McGhee's garage and his car. In order for the Government prove that Schwartz or Sarkis joined the conspiracy the Government must prove through the acts or statements testified to by any witness of Schwartz or Sarkis that they were aware that extortionate means were going to be used for the purpose of collecting an indebtedness due or allegedly due, or to punish McGhee for failure to pay.

It is necessary for the Government to prove beyond a reasonable doubt in order to bring Mr. Schwartz into the conspiracy through the act of directing Mr. Sarkis and Mr. Ebbert in their activities -- and I don't say that that's the only act or statement that is in the record, I am just saying that is an example -- when he sent Sarkis and Ebbert to collect money or repossess cars or trucks that he impliedly or expressly directed them to use extortionate means in an attempt to collect the obligations, in other words, he directed them to use threats or violence for the purpose of attempting to collect the indebtednesses due.

The Government must prove that the accused's

participation -- and that's either the defendant Schwartz or the defendant Sarkis -- was a conscious, deliberate and voluntary act and not committed through mistake, accident, carelessness or other innocent reason.

If the Government proves beyond a reasonable doubt that the conspiracy charged in the indictment existed at about the time for the purpose of using extortionate means to collect a debt due or allegedly due by McGhee and/or Taylor, and the Government proves beyond a reasonable doubt that the accused, being aware of the scheme or plan, knowingly participated in the scheme or plan by some statement, some action in a way that helped it to succeed, the accused thereby becomes a conspirator.

Now, one who willfully joins an existing conspiracy is charged with the same responsibility as if he had been a member of the conspiracy from its beginning. Whether or not Mr. Sarkis, if you find that he did become a member of the conspiracy -- whether or not Mr. Sarkis left the conspiracy, whether it terminated as to him as of April 23, 1975, when he took the plane to Puerto Rico, is a fact question for you to determine. The effect of leaving the conspiracy is

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Charge

that after one is not a member of the conspiracy he cannot be charged with any of the acts committed thereafter. It may sound like a paradox that someone who had joined the conspiracy is responsible for anything that happened before, the theory being that he is aware of it, and if he is ready to join it then he is responsible for everything that happened from the very beginning, but on leaving it, once he affirmatively shows he has left it, he should not be responsible for anything that happened thereafter.

The Government need not prove as part of the conspiracy count that the conspiracy succeeded. It must prove the existence of the conspiracy, that the accused knowingly and willfully joined the conspiracy and that thereafter one of the conspirators, not necessarily one of the accused but some partner, some member of the conspiracy, knowingly committed an overt act in furtherance of the purposes of the conspiracy.

An overt act is knowingly committed when one of the conspirators is aware that what he is doing is at least one step toward accomplishing the purpose of the conspiracy. In this case any threat knowingly made by a member of the conspiracy -- in other words, knowing that it was made for the purpose of using extortionate

means to collect the debt or of punishing McGhee for failing to pay the debt, or Grove Ebbert driving to McGhee's house, if it's shown that he did it for the purpose of making the threat, or the burning down of McGhee's garage, if the Government proves beyond a reasonable doubt that a member of the conspiracy was aware of what he was doing and did it willfully -- in other words, voluntarily and intentionally, that he had the mental capacity to do it and he did it for the purpose of punishing McGhee or attempting to collect the debt -- may be considered by you as overt acts.

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Charge

5pm R2

THE COUPT: (Continuing) Now, there was other evidence in the case -- Before I go to that I want to summarize the essential elements of the crime necessary to prove the crime of conspiracy. One, that the conspiracy described in the indictment was willfully formed and existing at or about the time alleged. The Government must prove that Schwartz, Sarkis and/or Ebbert knowingly and willfully joined and combined to use extortionate means to either collect or attempt to collect an indebtedness claimed due from Taylor or McGhee or to punish Taylor or McGhee for not paying the claimed indebtedness.

Two, that the accused knowingly and willfully became a member of the conspiracy. The Government must prove beyond a reasonable doubt that the accused participated with one or more of the others named knowing that it was a plan involving the use of an implied or express threat of the use of violence to cause harm to Taylor or McGhee or their property for the purpose of attempting to collect the indebtedness due.

The finding must be based on testimony of acts and declarations of the accused showing that the participation was knowing and willful.

And three, that one of the conspirators thereafter knowingly committed an overt act in pursuance of the purpose of the conspiracy.

As I have charged you, all the members of the conspiracy are responsible for all the acts and declarations made by every other member of the conspiracy, if made during the term of the conspiracy and to help along, to pursue, to help achieve the objectives of the conspiracy, and I described what the purposes of this conspiracy were.

The same is true as to any criminal act performed during the term of the conspiracy while the accused was a member of the conspiracy. As I said, there is no proof whatever that Mr. Schwartz knew, was aware, that either Ebbert or Sarkis would commit arson, set fire to McGhee's garage. There is no proof that he knew of any specific conversation that either Ebbert or Sarkis would indulge in the use of violence that might be considered an extortionate threat.

You may nevertheless find an accused charged in a substantive offense of using extortionate means to collect an indebtedness as charged in counts 1 and 2 even if you find that he was unaware of the purpose of his co-conspirators, if the Government proves beyond a

reasonable doubt that the conspiracy that is charged contemplated the type of criminal activity that was indulged in.

In other words, if the Government proves beyond a reasonable doubt that the conspiracy charged in count 3 existed during the time for the purposes set forth -- in other words, to use extortionate means to collect the indebtedness due or alleged due from McGhee or Taylor, in order to punish Taylor for non-payment -- and if you find that the defendant Schwartz knowingly and willfully became a member of that conspiracy, and if you further find that the offenses charged in counts 1 and 2 were committed by a member of the conspiracy, and you find that at the time that the offense was committed by one or more members of the conspiracy that the accused was also a member of that conspiracy, even though he did not commit the crime, and that the offenses charged in counts 1 and 2 were committed in furtherance of the conspiracy, then the accused whom you find to be a member of the conspiracy at the time the offenses were committed is liable for the substantive offenses.

In other words, during the trial I charged you that there were acts or declarations committed outside

the presence of an accused by one of the members of the conspiracy, and if you further find that the accused knowingly, willfully joined the conspiracy, then the accused is liable, is chargeable with those acts and declarations as being performed or stated during the term of the conspiracy and in furtherance of the objectives of the conspiracy, so too with criminal offenses committed by a member of the conspiracy, then any other member of the conspiracy whom you find knowingly and willfully joined the conspiracy and were members of the conspiracy at the time the offense was committed is criminally liable for the activities of the conspirators, the members of the conspiracy who committed the crime.

However, you will shortly be excused from the courtroom to deliberate on the matter before you. The jury is not to consider possible punishment. Disregard statements made by any lawyer in summation concerning punishment.

Your job is to determine the guilt or innocence of each defendant as to each crime charged and leave the matter of punishment to the Court.

Your verdict must be unanimous. Each member of the jury must try the case for himself and herself based

solely on the evidence adduced within the four walls of this courtroom and in accordance with the charge that I have given you.

In other words, all the litigants in this case are entitled to twelve separate verdicts where all the verdicts are the same. Itwould be improper for any juror to abandon his or her obligation and leave it to one of the others. It would be just as improper for any juror to assume the point of view, take the position as to any defendant on any count and refuse to discuss it with their fellow jurors. In other words, the jury process is a deliberative process, it's an exchange of ideas, so if you have arrived at a tentative verdict, and after discussion of the evidence with your fellow jurors you decide that the verdict thatyou tentatively arrived at is not supported by the evidence, don't hesitate to give it up and reconsider your position.

During your deliberations you may want to hear some of the testimony, you may want to see some of the exhibits. Send a note through your Foreman and tell me what you want to hear. If you want the exhibits, either specify the exhibits, or if you tell me that you want all the exhibits, I will send all the exhibits to you.

Charge

In asking for testimony I would appreciate it if you g[illegible]e the subject matter, if you gave the name of the witness. Tell me whether you want to hear the direct examination, the direct and cross, the entire examination. It takes a little time to locate testimony, so there might be a delay after a request is made, but all your communications must be through your foreman.

I cannot answer questions. If you send me a note and ask me what a certain witness said I must decline to answer that question. If you ask me for the testimony of a witness then I will give the testimony. As I say, if you want the exhibits, ask for the exhibits.

When you have arrived at a verdict -- and that means unanimous verdict -- and don't tell me during deliberations how you stand at any time, don't tell me you are 10 to 2, 7 to 5, 11 to 1; I am not interested -- I am interested as soon as you have arrived at a unanimous verdict.

All you need do is say, "We have a verdict," and I will know what that means. Don't tell me what the verdict is on the paper. When you say you have a verdict I will bring you intr the courtr[illegible]om and I will ask your Foreman to stand, and say in effect, "Madam Foreman, how does the jury find on Count 1 as to Jack

Schwartz; guilty or not guilty? As to George Sarkis, guilty or not guilty? How do you find on count 2 as to Jack Schwartz, guilty or not guilty? As to George Sarkis, guilty or not guilty?

"On Count 3 how do you find as to Jack Schwartz, guilty or not guilty, as to George Sarkis, guilty or not guilty?"

Then I will turn to Juror No. 2, ask you if you have heard the verdict as rendered by the Foreman, and so on down, and if I have got twelve verdicts all saying the same thing, then for the first time it becomes the verdict of this case.

I would appreciate it if you took leave of the Court. I want to talk to the lawyers. Don't start your deliberations yet. I will call you back to the courtroom shortly.

(continued next page)

there was no evidence that Schwartz directed the use of any specific extortionate means, and I will not refer to the scare.

MR. ROSEN: Thank you.

(Jury present)

THE COURT: I want to put your minds at ease. As soon as I get through saying what I have to say, I will excuse you for the day, and you can come back tomorrow morning.

I hope I said, and I intended to say that there was no evidence that Schwartz directed either Ebert or Sarkis to use any specific extortionate means, and I underscore "specific." That is all I said about the evidence concerning extortionate means, regarding directions by Schwartz to Sarkis and/or Ebert. I did say, and I will repeat it, each defendant is to be considered separately as to each charge. I told you at the very outset of the charge, and I repeat it, it is as if you have six trials. You measure the evidence in this case against each charge, and each defendant, to see whether the Government has proved the guilt of the defendant by proof beyond a reasonable doubt.

In charging on conspiracy and how an

accused may be proved to be a member of a conspiracy, I at times said that the Government must prove beyond a reasonable doubt, by acts or declarations of an accused that he knew that he was joining any combination or group for the purpose of using extortionate means.

I in no way intended to say that the Government had established the conspiracy. It is part of their burden.

When I charged you on the essential elements of the crime, I said, (1) the Government must prove beyond a reasonable doubt that the conspiracy charged in the indictment existed for the purpose and during the time.

At no time did I intend to suggest to you that the Government had proved that element. That's again a fact question for you. I have no opinion one way or the other.

In charging you on the limited use of the evidence, all the evidence concerning whether or not McGee had a gun, I said the only reason it was brought before you is that if you believe the evidence, it might explain why Mr. Sarkis was brought up from Puerto Rico, and that it might

negate the claim made by the Government that he was brought up from Puerto Rico for the purpose of using extortionate means. It doesn't matter whether or not you find McGee had a gun, if you believe that Schwartz believed that McGee had a gun, then you would consider the evidence in the same light.

I think that is all I have to say at this time. Each night when you left the courtroom I said it is very important that you do not talk about this case and that you do not come to any opinion. As the case went on, I said each day it became more important.

Well, I will use "most" today. It is most important that you do not talk to anyone about this case. Do not think about it, do not come to any decision by yourself.

The jury process is one where the jury makes its determination based on the evidence through an exchange of ideas with the other jurors. It would be improper if you made up your mind all by yourself and came into the jury room tomorrow and when I asked you to start your deliberations you said, "I have already decided this case." Even if you did not say that, but had already decided, it would be improper.

Keep an open mind and do not talk to anyone about it. Use extreme self-discipline in not discussing it with the folks at home. When you reassemble tomorrow, do not start discussing it among yourselves.

When all of you are here, I will excuse you to start your deliberations.

How early can you come? Is nine o'clock all right? 9:30?

All right, 9:30.

The case will continue tomorrow promptly at 9:30, and we will continue through the day, and tomorrow I expect that you will deliberate on the matter until maybe six or seven, and if you have not arrived at a verdict, I will disband you, and you will come back the next day.

Tell the folks at home that you will be a little late tomorrow.

The jury is excused.

(Jury leaves courtroom.)

THE COURT: I do not want anyone leaving the courtroom until the jury has left the courthouse.

Please come in promptly at 9:30. All I intend to do is exclude the alternates. Suppose 13 doesn't show up?

CERTIFICATE OF SERVICE

76-1324
Re: U.S.A. v. Schwartz & Sarkis

STATE OF NEW JERSEY :
: ss.:
COUNTY OF MIDDLESEX :

I, Muriel Mayer, being duly sworn according to law, and being over the age of 21 upon my oath depose and say that: I am retained by the attorney for the above named Appellant.

That on the 7th day of September, 1976, I served the within Appendix for Defendant-Appellant Jack G. Schwartz

in the matter of United States of America v. J.G.Schwartz & G. Sarkis

upon United States Attorney, 2nd Circuit,
United States Eastern District
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

by depositing one (1) true copies of the same securely enclosed in a post-paid wrapper, in an official depository maintained by the United States Government.

Muriel Mayer
Muriel Mayer

Sworn to and subscribed
before me this 7th day
of September 1976.

Lorraine Leotta
A Notary Public of the
State of New Jersey.
LORRAINE LEOTTA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 13, 1977